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NORTH CAROLINA REPORTS
VOL. 190

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

[V.190]

SPRING TERM, 1925
FALL TERM, 1925

REPORTED BY
ROBERT C. STRONG

RALEIGH
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JUSTICES

OF THE

SUPREME COURT OF NORTH CAROLINA

FALL TERM, 1925

CHIEF JUSTICE:

W. P. STACY.

ASSOCIATE JUSTICES:

W. J. ADAMS,
HERIOT CLARKSON,
GEORGE W. CONNOR,
L. R. VARSER.

ATTORNEY-GENERAL:

DENNIS G. BRUMMITT.

ASSISTANT ATTORNEY-GENERAL:

FRANK NASH.

SUPREME COURT REPORTER:

ROBERT C. STRONG.

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JUDGES

OF THE

SUPERIOR COURTS OF NORTH CAROLINA

EASTERN DIVISION

Name	*District*	*Address*
W. M. Bond	First	Edenton.
M. V. Barnhill	Second	Rocky Mount.
G. E. Midyette	Third	Jackson.
F. A. Daniels	Fourth	Goldsboro.
Romulus A. Nunn	Fifth	New Bern.
Henry A. Grady	Sixth	Clinton.
T. H. Calvert	Seventh	Raleigh.
E. H. Cranmer	Eighth	Southport.
N. A. Sinclair	Ninth	Fayetteville.
W. A. Devin	Tenth	Oxford.

WESTERN DIVISION

H. P. Lane	Eleventh	Reidsville.
Thomas J. Shaw	Twelfth	Greensboro.
A. M. Stack	Thirteenth	Monroe.
W. F. Harding	Fourteenth	Charlotte.
John M. Oglesby	Fifteenth	Concord.
J. L. Webb	Sixteenth	Shelby.
T. B. Finley	Seventeenth	Wilkesboro.
Michael Schenck	Eighteenth	Hendersonville.
P. A. McElroy	Nineteenth	Marshall.
T. D. Bryson	Twentieth	Bryson City.

SOLICITORS

EASTERN DIVISION

Name	*District*	*Address*
Walter L. Small	First	Elizabeth City.
Donnell Gillam	Second	Tarboro.
R. H. Parker	Third	Enfield.
Clawson L. Williams	Fourth	Sanford.
Jesse H. Davis	Fifth	New Bern.
James A. Powers	Sixth	Kinston.
W. F. Evans	Seventh	Raleigh.
Woodus Kellum	Eighth	Wilmington.
T. A. McNeill	Ninth	Lumberton.
L. P. McLendon	Tenth	Durham.

WESTERN DIVISION

S. Porter Graves	Eleventh	Mount Airy.
J. F. Spruill	Twelfth	Lexington.
F. D. Phillips	Thirteenth	Rockingham.
John G. Carpenter	Fourteenth	Gastonia.
Zeb. V. Long	Fifteenth	Statesville.
R. L. Huffman	Sixteenth	Morganton.
Johnson J. Hayes	Seventeenth	N. Wilkesboro.
J. W. Pless, Jr.	Eighteenth	Marion.
J. E. Swain	Nineteenth	Asheville.
Grover C. Davis	Twentieth	Waynesville.

LICENSED ATTORNEYS

FALL TERM, 1925

The Supreme Court granted law licenses to the following named successful applicants, Fall Term, 1925.

ALLEN, OLIVER HARRISON ..... Goldsboro.
ALLEN, THOMAS WARREN ..... Asheville.
BALL, GEORGE WASHINGTON ..... Raleigh.
BASS, THOMAS EDWARD ..... Henderson.
BAUMBERGER, JOHN ERNEST ..... Asheville.
BORDEAUX, ELMER CARL ..... Wilmington.
BERNHARDT, JAMES DOUGLAS ..... Lenoir.
BINGHAM, RALPH GRAY ..... Boone.
BLAKE, WYATT ELBERT ..... Burgaw
BOWERS, JORDAN VALENTINE ..... Elk Park.
BRADY, ALFRED BENJAMIN ..... Salisbury
BROOKS, EUGENE CLYDE, JR. ..... Raleigh.
BUCK, CHARLES G. ..... Bald Mountain.
BUNDY, WILLIAM JAMES ..... Farmville.
CALLAHAN, JOHN WILLIAM ..... Raleigh.
CARPENTER, ROBERT RHYNE ..... Crouse.
CHEESBOROUGH, JOHN CHEESBOROUGH ..... Asheville.
COMER, WILLIAM ERNEST ..... North Wilkesboro.
CORBETT, ALBERT ANDERSON ..... Selma.
CROCKER, GEORGE FENTON ..... Henderson.
CURLEY, CLARENCE BENJAMIN ..... Durham.
CURRIE, CLAUDE ..... Chapel Hill.
DAWES, REDMOND BLANFORD ..... Roseboro.
DEANS, GEORGE THOMAS, JR. ..... Goldsboro.
DIXON, ROBERT HADLEY, JR. ..... Siler City.
EDWARDS, JACK RAWLINGS ..... Hertford.
FISHER, HENRY ELBERT ..... Garner.
GARRETT, JAMES EDWARD ..... Rockingham.
GARRETT, CHARLES GRADY ..... Durham.
GORHAM, WILLIAM CHURCHILL ..... Morehead City.
HAMMOND, CHARLES STUART ..... Rowland.
HATHCOCK, BERNARD DUNLAP ..... Washington, D. C.
HOOD, FRANK LEE, JR. ..... Asheville.
HORTON, SAMUEL FERD ..... Vilas.
HUDSPETH, HAROLD MASON ..... Asheville.
JAMES, DINK ..... Greenville.
JOHNSON, ALFRED TURNER ..... Angier.
JOHNSON, JOHN DANIEL ..... Lillington.
JONES, GROVER HILTON ..... Kershaw, S. C.
JOYNER, JACK ..... Garysburg.
LOVELACE, JAMES BAILEY ..... Farmville.

McNeill, Frank.....Lumberton.
McCoy, Thomas Augustus.....Asheville.
Marshburn, Errol Otis.....Apex.
Merritt, David Kenneth.....Raleigh.
Mewshaw, Arthur Williams.....Lumberton.
Moyer, Joseph Kearney.....Washington, D. C.
Moysey, Mabel Carpenter.....Charlotte.
Myatt, James Archibald.....High Point.
Newitt, John Garwood.....Charlotte.
Newton, Adrian Jefferson.....Thomasville.
Noland, Frank Norman.....Waynesville.
Parish, Thomas Dixon.....Raleigh.
Paschal, Franklin Loten.....Siler City.
Phillips, Robert Wesley.....Winston-Salem.
Powers, Clovis Boyd.....Lumberton.
Roberts, Harry Russell.....Raleigh.
Rose, Perley John.....Washington, D. C.
Seawell, Herbert Floyd, Jr.....Carthage.
Smith, Paul Jennings.....Asheville.
Smith, Percy Lloyd.....Willow Springs.
Spoolman, George Cleveland.....Windsor.
Thompson, Franklin.....Jacksonville.
Turner, Dent.....Statesville.
Upchurch, Rufus Pearson.....Raleigh.
Whedbee, Silas Martin.....Hertford.
Whitacre, Hiram Purcell.....Salisbury.
Whitley, Robert Clinton.....Washington, D. C.
Woodley, Thomas Daniel.....Creswell.
Woltz, Greer Cornelius.....Mt. Airy.
Young, Willoughby Foster.....Wilson.

Under Comity Act from South Carolina.

Ackerman, Wendell Elsworth.
Jones, Charles DePass.

CALENDAR OF COURTS

TO BE HELD IN

NORTH CAROLINA DURING THE SPRING TERM OF 1926

SUPREME COURT

The Supreme Court meets in the city of Raleigh on the first Monday in February and the last Monday in August of every year. The examination of applicants for license to practice law, to be conducted in writing, takes place one week before the first Monday in each term.

The Judicial Districts will be called in the Supreme Court in the following order:

	Spring Term, 1926
First District	February 2
Second District	February 9
Third and Fourth Districts	February 16
Fifth District	February 23
Sixth District	March 2
Seventh District	March 9
Eighth and Ninth Districts	March 16
Tenth District	March 23
Eleventh District	March 30
Twelfth District	April 6
Thirteenth District	April 13
Fourteenth District	April 20
Fifteenth and Sixteenth Districts	April 27
Seventeenth and Eighteenth Districts	May 4
Nineteenth District	May 11
Twentieth District	May 18

SUPERIOR COURTS, SPRING TERM, 1926

The parenthesis numerals following the date of a term indicate the number of weeks during which the term may hold.

In many instances the statutes apparently create conflicts in the terms of court.

THIS CALENDAR IS UNOFFICIAL

EASTERN DIVISION

FIRST JUDICIAL DISTRICT

SPRING TERM, 1926—*Judge Grady.*

Camden—Mar. 8.
Beaufort—Jan. 11*; Feb. 15† (2); April 5†; May 3† (2).
Gates—Mar. 22.
Tyrrell—Jan. 25†; April 19.
Currituck—Mar. 1; April 26†.
Chowan—Mar. 29.
Pasquotank—Dec. 28† (2); Feb. 8†; Mar. 15; June 7†; June 14‡.
Hyde—May 17.
Dare—May 24.
Perquimans—Jan. 18; April 12.

SECOND JUDICIAL DISTRICT

SPRING TERM, 1926—*Judge Calvert.*

Washington—Jan. 4 (2); April 12†.
Nash—Jan. 25; Feb. 15† (2); Mar. 8; April 19† (2); May 24.
Wilson—Feb. 1*; Feb. 8†; May 10*; May 17†; June 21†.
Edgecombe—Jan. 18; Mar. 1; Mar. 29† (2); May 31 (2).
Martin—Mar. 15 (2); June 14.

THIRD JUDICIAL DISTRICT

SPRING TERM, 1926—*Judge Cranmer.*

Northampton—Mar. 29 (2).
Hertford—Feb. 22; April 12 (2).
Halifax—Jan. 25 (2); Mar. 15† (2); April 26* (A); May 31 (2).
Bertie—Feb. 8 (2); April 26† (3).
Warren—Jan. 11 (2); May 17 (2).
Vance—Jan. 4*; Mar. 1*; Mar. 8†; June 14‡; June 21†.

FOURTH JUDICIAL DISTRICT

SPRING TERM, 1926—*Judge Sinclair.*

Lee—Mar. 22 (2); May 3.
Chatham—Jan. 11; Mar. 1†; Mar. 15†; May 10*; June 7.
Johnston—Feb. 15† (2); Mar. 8; April 19† (2).
Wayne—Jan. 18 (2); April 5† (2); May 24 (2).
Harnett—Jan. 4; Feb. 1† (2); May 17.

FIFTH JUDICIAL DISTRICT

SPRING TERM, 1926—*Judge Devin.*

Pitt—Jan. 11†; Jan. 18; Feb. 15†; Mar. 15 (2); April 12 (2); May 17† (2).
Craven—Jan. 4*; Feb. 1† (2); April 5‡; May 10†; May 31*.
Carteret—Jan. 25; Mar. 8; June 7 (2).
Pamlico—April 26 (2).
Jones—Mar. 29.
Greene—Feb. 22 (2); June 21.

SIXTH JUDICIAL DISTRICT

SPRING TERM, 1926—*Judge Bond.*

Onslow—Mar. 1; April 12† (2).
Duplin—Jan. 4† (2); Jan. 25*; Mar. 22† (2).
Sampson—Feb. 1 (2); Mar. 8† (2); April 26 (2).
Lenoir—Jan. 18*; Feb. 15† (2); April 5; May 17*; June 7† (2).

SEVENTH JUDICIAL DISTRICT

SPRING TERM, 1926—*Judge Barnhill.*

Wake—Jan. 4*; Jan. 25†; Feb. 1*; Feb. 8†; Mar. 1*; Mar. 8† (2); Mar. 22† (2); April 5*; April 12† (2); April 26†; May 3*; May 17† (2); May 31*; June 7† (2).
Franklin—Jan. 11 (2); Feb. 15† (2); May 10.

EIGHTH JUDICIAL DISTRICT

SPRING TERM, 1926—*Judge Midyette.*

New Hanover—Jan. 11*; Feb. 1† (2); Mar. 1† (2); Mar. 15*; April 12† (2); May 10*; May 24† (2); June 7*.
Pender—Jan. 18; Mar. 22† (2); May. 17.
Columbus—Jan. 25; Feb. 15† (2); April 26 (2).
Brunswick—Jan. 4†; April 5; June 14†.

NINTH JUDICIAL DISTRICT

SPRING TERM, 1926—*Judge Daniels.*

Robeson—Jan. 25*; Feb. 1; Feb. 22† (2); Mar. 29† (2); May 10† (2).
Bladen—Jan. 4†; Mar. 8*; April 19†.
Hoke—Jan. 18; April 12.
Cumberland—Jan. 11*; Feb. 8† (2); Mar. 15† (2); April 26† (2); May 24*.

TENTH JUDICIAL DISTRICT

SPRING TERM, 1926—*Judge Nunn.*

Alamance—Feb. 22*; Mar. 29†; May 3†; May 24† (2); June 14*.
Durham—Jan. 4† (2); Feb. 15*; Mar. 1† (2); Mar. 22*; April 26†; May 17*.
Granville—Feb. 1 (2); April 5 (2).
Orange—Mar. 15; May 10†.
Person—Jan. 25; April 19.

WESTERN DIVISION

ELEVENTH JUDICIAL DISTRICT

SPRING TERM, 1926—*Judge Webb.*

Ashe—April 5 (2).
Forsyth—Jan. 4 (2); Feb. 8† (2); Mar. 8† (2); Mar. 22*; May 17† (3); June 21† (A).
Rockingham—Jan. 18*; Feb. 22† (2); May 10; June 14† (2).
Caswell—Mar. 29.
Alleghany—May 3.
Surry—Jan. 11† (2); Feb. 1; Mar. 15† (2); April 19 (2); June 21† (2).

TWELFTH JUDICIAL DISTRICT

SPRING TERM, 1926—*Judge Finley.*

Davidson—Jan. 25*; Feb. 15† (2); May 3*; May 24†; June 21*.
Guilford—Jan. 4† (2); Jan. 18*; Feb. 1† (2); Mar. 1* (2); Mar 15† (2); April 12† (2); April 26*; May 10† (2); May 31† (2); June 14*.
Stokes—Mar. 29*; April 5†.

THIRTEENTH JUDICIAL DISTRICT

SPRING TERM, 1926—*Judge Schenck.*

Stanly—Feb. 1†; Mar. 29; May 10†.
Richmond—Dec. 28†; Jan. 4*; Mar. 15†; April 5*; May 24†; June 14†.
Union—Jan. 25*; Feb. 15† (2); Mar. 22†; May 3†.
Anson—Jan. 11*; Mar. 1†; April 12; April 19†; June 7†.
Moore—Jan. 18*; Feb. 8†; May 17†.
Scotland—Mar. 8†; April 26; May 31.

FOURTEENTH JUDICIAL DISTRICT

SPRING TERM, 1926—*Judge McElroy.*

Mecklenburg—Jan. 4*; Feb. 1† (3); Feb. 22*; Mar. 1† (2); Mar. 29† (2); April 26† (2); May 10*; May 17† (2); June 7*; June 14†.
Gaston—Jan. 11*; Jan 18† (2); Mar. 15† (2); April 12*; May 31*.

FIFTEENTH JUDICIAL DISTRICT

SPRING TERM, 1926—*Judge Bryson.*

Montgomery—Jan. 18*; April 5† (2).
Randolph—Mar. 15† (2); Mar. 29*.
Iredell—Jan. 25 (2); Mar. 8†; May 17 (2).
Cabarrus—Jan. 4 (2); Feb. 22†; April 19 (2).
Rowan—Feb. 8 (2); Mar. 1†; May 3 (2).

SIXTEENTH JUDICIAL DISTRICT

SPRING TERM, 1926—*Judge Lane.*

Catawba—Jan. 11† (2); Feb. 1 (2); May 3† (2).
Lincoln—Jan. 18† (2).
Cleveland—Mar. 22 (2).
Burke—Mar. 8 (2); May 31† (2).
Caldwell—Feb. 22 (2); May 17† (2).

SEVENTEENTH JUDICIAL DISTRICT

SPRING TERM, 1926—*Judge Shaw.*

Alexander—Feb. 15.
Yadkin—Feb. 22*; May 10† (2).
Wilkes—Mar. 1 (2); May 31† (2).
Davie—Mar. 15; May 24†.
Watauga—Mar. 22 (2).
Mitchell—April 5 (2).
Avery—April 19 (2).

EIGHTEENTH JUDICIAL DISTRICT

SPRING TERM, 1926—*Judge Stack.*

Transylvania—Jan. 25*; April 5 (2).
Henderson—Jan. 4† (2); Mar. 1 (2); May 24† (2).
Rutherford—Feb. 1† (2); May 10 (2).
McDowell—Feb. 15 (2); June 7† (2).
Yancey—Mar. 22 (2).
Polk—April 19 (2).

NINETEENTH JUDICIAL DISTRICT

SPRING TERM, 1926—*Judge Harding.*

Buncombe—Jan. 11† (2); Jan. 25; Feb. 1† (2); Feb. 15; Mar. 1† (2); Mar. 15; Mar. 29; April 5† (2); April 19; May 3† (2); May 17; May 31; June 7† (2); June 21 (2).
Madison—Feb. 22; Mar. 22; April 26; May 24.

TWENTIETH JUDICIAL DISTRICT

SPRING TERM, 1926—*Judge Oglesby.*

Haywood—Jan. 4† (2); Feb. 1 (2); May 3† (2).
Cherokee—Jan. 18† (2); Mar. 29 (2); June 14†.
Jackson—Feb. 15 (2); May 17† (2).
Swain—Mar. 1 (2).
Graham—Mar. 15 (2); May 31† (2).
Clay—April 12.
Macon—April 19 (2).

*For criminal cases only.
†For civil cases only.
‡For civil and jail cases.
(A) Emergency Judge to be assigned.

UNITED STATES COURTS FOR NORTH CAROLINA

DISTRICT COURTS

Eastern District—Isaac M. Meekins, *Judge*, Wilson.
Western District—James E. Boyd, *Judge*, Greensboro.
Western District—Edwin Yates Webb, *Judge*, Shelby.

EASTERN DISTRICT

Terms—District courts are held at the time and place as follows:

Raleigh, fourth Monday after fourth Monday in April and October. Civil terms, first Monday in March and September. S. A. Ashe, Clerk.

Elizabeth City, second Monday in April and October. J. P. Thompson, Deputy Clerk, Elizabeth City.

Washington, third Monday in April and October. Arthur Mayo, Deputy Clerk, Washington.

New Bern, fourth Monday in April and October. Albert T. Willis, Deputy Clerk, New Bern.

Wilmington, second Monday after the fourth Monday in April and October. H. H. Ford, Deputy Clerk, Wilmington.

Fayetteville, Monday before the last Monday in March and September. S. A. Ashe, Clerk, Raleigh.

Wilson, first Monday in April and October. S. A. Ashe, Clerk, Raleigh.

OFFICERS

Irvin B. Tucker, United States District Attorney, Whiteville.
J. D. Parker, Assistant United States District Attorney, Smithfield.
Willis G. Briggs, Assistant United States District Attorney, Raleigh.
R. W. Ward, United States Marshal, Raleigh.
S. A. Ashe, Clerk United States District Court, Raleigh.

WESTERN DISTRICT

Terms—District courts are held at the time and place as follows:

Greensboro, first Monday in June and December. R. L. Blaylock, Clerk; Myrtle Dwiggins, Chief Deputy; Della Butt, Deputy.

Statesville, third Monday in April and October. W. W. Leinster, Deputy Clerk.

Asheville, first Monday in May and November. J. Y. Jordan and O. L. McLurd, Deputy Clerks.

Charlotte, first Monday in April and October. E. S. Williams, Deputy Clerk.

Wilkesboro, fourth Monday in May and November. Milton McNeill, Deputy Clerk.

Salisbury, fourth Monday in April and October. W. W. Leinster, Deputy Clerk, Statesville.

Shelby, fourth Monday in September and third Monday in March. E. S. Williams, Deputy Clerk, Charlotte.

OFFICERS

Frank A. Linney, United States District Attorney, Charlotte.
F. C. Patton, Assistant United States Attorney, Charlotte.
Thos. J. Harkins, Assistant United States Attorney, Asheville.
K. J. Kindley, Assistant United States Attorney, Charlotte.
Brownlow Jackson, United States Marshal, Asheville.
R. L. Blaylock, Clerk United States District Court, Greensboro.

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CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

SPRING TERM, 1925

FRANK NICHOLS v. CHAMPION FIBRE COMPANY, CHARLEY SETZER, AND GEORGE H. JONES.

(Filed 24 June, 1925.)

1. Principal and Agent — Negligence — Vice Principals — Nondelegable Duties—Verdict—Judgments.

While damages against the principal may not be recovered when dependent solely upon the negligence of its employees, upon allegations and evidence that the failure of the principal had proximately caused the injury in suit from its failure to perform a nondelegable duty to provide for the safety of its employee, the plaintiff in the action, a motion to set aside a verdict only against the principal, when others of its employees as vice principals were likewise parties to the action, and to sign a judgment also exonerating the principal from liability, is properly denied.

2. Instructions—Pleadings—Evidence—Appeal and Error.

Where in an action to recover damages for an injury negligently inflicted on plaintiff, there is allegation and evidence to sustain the action on the issue, the instruction of the court upon the law embraced by the controversy is an essential part of the verdict, and failure of the judge to charge thereon (C. S., 564) is reversible error, especially so when opposing counsel had argued the facts and the law as permitted them under the provisions of C. S., 203.

APPEAL by defendant from *Finley, J.*, at February Term, 1925, of HAYWOOD.

On 28 September, 1923, defendant, Champion Fibre Company, a corporation, owned and operated a lumber plant at Waynesville, N. C.;

it also owned and used in connection therewith a narrow-gauge railroad, extending from Waynesville back into the mountains; on this railroad it operated cars by means of locomotive engines for the purpose of hauling saw logs and acid and pulpwood from points in the mountains to its plant at Waynesville; this logging road extended to the town of Delwood, at Jonathan's Creek; one branch of said railroad extended down the creek and the other up the creek; at the point where the fork is located, defendant maintains a switch, known as the Delwood Switch; about a mile or so above this switch, on the branch running up the creek, is another switch, known as the Carpenter Switch. Defendant, in the conduct of its business, operated on this railroad two trains, one known as the "little train" and the other as the "logging train." The switches were located and maintained to enable trains to pass each other.

On said date, plaintiff, Frank Nichols, was employed by said company as brakeman and flagman on the logging train; defendants, Charley Setzer and George H. Jones, were also employed by said company, the former as general manager and foreman of the logging crew, and the latter as engineer on the logging train.

On the morning of 28 September, 1923, defendant company had sent its "little train" up the mountains on said railroad for the purpose of bringing down a load of steel rails; shortly after said "little train" left the plant at Waynesville the "logging train," consisting of ten empty log cars and one wood car, with Setzer in charge and Jones as engineer, and plaintiff as brakeman and flagman, left the plant on said railroad for the purpose of going up to and beyond the Carpenter Switch for a load of logs and acid wood, with directions to pass the "little train" at Delwood. This train was backed up the mountain, the engine being in the rear of the cars. When the logging train reached Delwood it was ascertained that the "little train" was not there and was not in sight. Signals were given and the train was stopped. After waiting a moment for the "little train," the engineer, under orders, started the "logging train" again, backing up the mountain. As the train went around a curve, at a rapid rate of speed, smoke from the engine of the "little train" was seen. Plaintiff, who was sitting on a bolster of one of the cars with Setzer, arose and went up on a car and gave signals to the engineer who was several car lengths behind him. Jones then put on brakes, causing the train to slow down; plaintiff had no place on which to stand while giving signals to the engineer except the running gear of a log car. The signals could not be given to the engineer by plaintiff while sitting down. The distance between the two trains was about 400 feet. Before the "logging train" came to a full stop, while the slack was being taken up, the engineer caused the train to

start forward again with a sudden jerk. Plaintiff, who had not resumed his seat on the bolster of the car as the train thus moved forward, fell from the train, with the result that he was seriously and permanently injured.

This action is prosecuted to recover of defendants, Champion Fibre Company and its employees, Charley Setzer and George H. Jones, damages for such injuries, upon the allegation that "the careless, tortuous and negligent acts, conduct and omissions of the defendants and each of them, as hereinabove, in the complaint specifically pleaded, directly, materially, concurrently, jointly, and proximately contributed to and were the direct and material, concurrent, joint and proximate cause of the plaintiff's aforesaid injury."

The verdict rendered by the jury was as follows:

1. Was the plaintiff injured by the negligence of the defendants, or either of them, and if so, which, as alleged in the complaint? Answer: Yes; Champion Fibre Company.

2. Did defendant by his own negligence contribute to his injury, as alleged in the answer? Answer: No.

3. What damages, if any, is the plaintiff entitled to recover? Answer: $7,000.

Upon this verdict defendants tendered to the court the following judgment and moved the court to sign same: "The jury having found by its verdict that the defendants, George H. Jones and Charles Setzer, were not guilty of negligence that caused the plaintiff's injury, and this finding having, as a matter of law, exonerated not only the said Jones and Setzer, but also the Champion Fibre Company, from liability, upon motion of Morgan & Ward and Martin, Rollins & Wright, attorneys for defendants, it is ordered and adjudged that plaintiff have and recover nothing by his action, and defendants, and each of them, go hence without day, and that plaintiff pay the costs of this action."

The motion was denied, and the court declined to sign judgment as tendered. Defendant, Champion Fibre Company, excepted.

To the judgment rendered by this court, defendant, Champion Fibre Company, excepted and appealed therefrom to this Court, assigning errors.

Alley & Alley for plaintiff.
Martin, Rollins & Wright for defendant.

CONNOR, J. The jury by its verdict has found that plaintiff was not injured by the negligence of Setzer or Jones, employees of their co-defendant, Champion Fibre Company. Neither of them is, therefore, liable to plaintiff for damages as alleged in the complaint. The jury

has further found that plaintiff was injured by the negligence of defendant, Champion Fibre Company, as alleged in the complaint. This defendant, upon the verdict, is liable to plaintiff, and the judgment that he recover of the Champion Fibre Company the sum assessed by the jury as his damages must be affirmed, unless the assignments of error, upon this appeal, are sustained.

Defendant, Champion Fibre Company, assigns as error the refusal of the court to sign judgment tendered by it, upon the verdict of the jury and the charge of the court. This assignment of error is based upon the contention that, notwithstanding the several allegations of negligence in the complaint, there was evidence only upon the specific allegations that plaintiff's injuries were caused by the wrongful acts of defendants, Setzer and Jones, employees of their codefendant, and that the court instructed the jury only upon the law applicable to the matters involved in these allegations. The jury having found that plaintiff was not injured by the negligence of either of its employees, Champion Fibre Company contends that it is not liable, as their employer, to plaintiff, and that the court should have so adjudged.

Plaintiff contends that there were both allegations and evidence that Champion Fibre Company, his employer, failed to perform certain primary, nondelegable duties which it owed him as its employee, and that such failure was the proximate, or at least concurrent, cause of his injuries. Plaintiff further contends that his allegations in these respects are sustained by the verdict, and that this assignment of error ought not to be sustained.

If each and all the allegations of negligence, set out in the complaint, involve only the conduct of Setzer and Jones, employees of Champion Fibre Company, and the liability of said company arises solely from the application of the principle of *respondeat superior,* the assignment of error must be sustained, for upon such allegations if the employee or servant is not liable it must follow that the employer or master is equally free from liability. *Bradley v. Rosenthal,* 97 Pac., 875; *Doremus v. Root,* 63 Pac., 572; *Cressler v. Brown,* 192 Pac., 417; *Williford v. Kansas City R. Co.,* 154 Fed., 514; *New Orleans & N. E. R. Co.,* 142 U. S., 18. On the other hand, if there are allegations of negligence, involving not only the conduct of the employees, but also the conduct of the common employer, and such conduct of the employer as alleged is in breach of one or more of the primary, nondelegable duties of the employer to the injured employee, then the finding of the jury that the injuries sustained by the employee were not caused by the negligence of his fellow-employees, but was caused by the negligence of the employer, does not exonerate the employer. The employer is liable, even if the negligence of the employee concurred with that of the

employer in causing the injury as the proximate cause thereof. *Beck v. Chair Co.,* 188 N. C., 743; *Thomas v. Lawrence,* 189 N. C., 521. When the negligence of the employee is alleged as the only and exclusive cause of the injury and the allegation is not sustained by the verdict the employer cannot be held liable, for his liability is dependent upon the negligence of his employee, and not upon his own conduct.

The five several, specific allegations of negligence, set out in the complaint, as summarized in plaintiff's brief, are as follows:

(a) The failure of defendant company to have and promulgate rules, orders and signals for the safe and proper movements of its trains;

(b) Its failure to furnish a safe and prudent trainmaster;

(c) Its failure to furnish the plaintiff a safe and suitable place to stand on its logging cars while performing his duties;

(d) The negligent order of its trainmaster, Charley Setzer, upon approaching the Delwood Switch;

(e) The negligent manner in which George H. Jones, the engineer, operated the train after receiving such order.

If the evidence submitted to the jury was sufficient for them to find therefrom facts, which, under the instructions of the court as to the law applicable to these facts, sustain either of the allegations of negligence, as set out in the complaint, and if the jury further found that such negligence was the proximate cause of the injuries to plaintiff, resulting in damages, then plaintiff is entitled to judgment that he recover such sum as the jury may assess as damages. His right of recovery is not dependent upon proof that all his allegations of negligence are sustained. If defendant, by its negligence in any respect, as alleged in the complaint, caused plaintiff's injuries, or if either of the defendants, Setzer or Jones, employees of Champion Fibre Company, by his negligence, as alleged, caused the injuries, then in either event defendant is liable. Liability of the master may be either primary, as arising from injuries caused by breach of duty which the master owes, and which he cannot delegate, or secondary, as arising from the maxim *qui facit per alium facit per se.* "Where several grounds of liability are alleged, proof of one will be sufficient to authorize a recovery." 20 R. C. L., 177, and cases cited in note. *Farnon v. Mines Co.,* 50 Utah 295, 167 Pac., 675, 9 A. L. R., 248.

There was evidence sufficient to be submitted to the jury upon the allegations of a breach of the primary duties, or at least of one of them, alleged in the complaint, and that such breach was the proximate, or at least concurring, cause of plaintiff's injury. As there are both allegations and evidence supporting the answer to the first issue, defendant's first assignment of error cannot be sustained. There was no error in the refusal of the court to sign judgment tendered by defendant.

Defendant further assigns as error the failure of the court in the charge to the jury to comply with the requirements of C. S., 564. This statute makes it the duty of the judge presiding at a trial, in which issues are submitted to the jury, "to state in a plain and correct manner the evidence given in the case and to declare and explain the law arising thereon." Defendant contends that his Honor did not in his charge declare and explain the law applicable to the facts as the jury might find them to be from the evidence, but simply stated the contentions of the parties, both as to the facts and as to the law. There are no exceptions to the charge as given, nor were there any prayers for special instructions.

His Honor charged the jury as follows: "In order to establish actionable negligence the plaintiff is required to show by the greater weight of the evidence, first, that there has been a failure to exercise proper care in the performance of some legal duty which the defendant owed the plaintiff under the circumstances in which they were placed, proper care being that degree of care which a prudent man should use under like circumstances when charged with a like duty; second, that such negligent breach of duty was the proximate cause of the injury." "You will notice that the law does not require an extraordinary amount of care, nor is it satisfied with a small amount, but it is that degree of care which a man of ordinary prudence would exercise under the same circumstances."

His Honor then stated fully and at length the contentions of plaintiff and defendants upon the issues. He concludes the charge with the following words, "You have heard the evidence and heard the arguments of counsel. It is purely a question of fact for you to determine. The court cannot have any opinion about it. If the lawyers on either side have given you an opinion it is something that is incompetent, because you are the only men who have any right to have a legal opinion. The witnesses can tell you the facts and then taking all the facts you should balance it up and measure it mentally and then say how you decide each issue in proportion to how you find the facts to be."

We do not find in the charge any instruction to the jury as to the law arising upon and applicable to the facts which they may find from the evidence. His Honor did not declare and explain the duties which the law imposed upon defendant as employer of plaintiff with respect to any of the matters involved in the allegations of negligence. Nor did he instruct the jury as to the law with respect to the breach of any of these duties, and the relation of such breach to the injuries as the proximate or concurrent cause thereof. The statement of the general principles of law, without an application to the specific facts involved

in the issue, is not a compliance with the provisions of the statute. *Hauser v. Furniture Co.*, 174 N. C., 463; *S. v. Merrick*, 171 N. C., 788.

Counsel had doubtless argued the whole case, "as well of law as of fact to the jury," as they had a right to do. C. S., 203. The jury was instructed that the opinions of the lawyers arguing the case, both as to the law and the facts, were "incompetent because you are the only men who have a right to have a legal opinion." It is of course, elementary that while the jury must determine the facts from the evidence, it is both the function and duty of the judge to instruct them as to the law applicable to the facts. The answers to the issues submitted in this case are not to be determined altogether by the facts; each issue involved matters of law, and the jury should have been instructed by the judge as to the law. While counsel may argue the law of the case to the jury, both plaintiff and defendant are entitled, as a matter of right, to have the judge declare and explain the law arising on the evidence. A failure to comply with the statute must be held as error. The error was not waived in this case by failure of defendant to request special instructions. An answer to an issue, not supported by evidence or contrary to the evidence is objectionable; an answer determined by the jury, without instructions by the judge as to the law involved, is no less objectionable. Liability for negligence arises from the application of well-settled general principles of law to the facts of specific cases; it is not to be determined solely by the jury; the judge has his function and his duty; actionable negligence is a mixed question of law and fact—no less of law, to be determined by the judge, than of fact, to be determined by the jury.

In this case, the answer to the issue fixing defendant with liability for $7,000 was made by the jury, without instruction from the judge as to the law. The assignment of error must be sustained. Upon the issues arising on the pleadings between plaintiff and defendant, appellant, there must be a

New trial.

DURHAM PROVISION COMPANY v. W. M. DAVES.

(Filed 24 June, 1925.)

Constitutional Law—Courts—Legislative Powers—Delegation of Powers—Recorders' Courts—Extended Jurisdiction—County Commissioners.

The provisions of Art. IV, sec. 12, of our Constitution giving the Legislature the authority to distribute that portion of the judicial power and jurisdiction of courts not pertaining to the Supreme Court, among other courts is restricted in its exercise to the Legislature itself, and may not be delegated by it; and where a recorder's court has been already estab-

lished under the provisions of the Constitution, Art. II, sec. 29, an act of the Legislature which authorizes the county commissioners to increase the jurisdiction of such recorder's courts in civil matters is unconstitutional and invalid. Instances in which statutes are held valid that permit a delegation of power only to ascertain the existence of facts that bring the case within the exercise of a valid legislative power, discussed by STACY, C. J.

APPEAL by defendant from *Calvert, J.*, at May Term, 1925, of DURHAM.

Civil action to collect balance due on open account, amounting to $268.46, tried at the May term of the recorder's court of Durham County.

The action was originally brought in the Superior Court of Durham County and transferred to the recorder's court of said county for trial, under authority of chapter 305, Public Laws 1925, the pertinent provisions of which are as follows:

"Section 1. That in any county of this State in which there is now established by law, whether by general or special act, or in which there may hereafter be established by general or special law, a recorder's court or a county court which possesses county-wide criminal jurisdiction of misdemeanors and also possesses jurisdiction in criminal matters to bind over to the Superior Court persons charged with felony, the board of commissioners of such county may at any regular meeting thereof after the ratification of this act pass a resolution conferring upon such above designated recorder's court or county court civil jurisdiction as hereinafter provided and when such resolution is duly adopted by said board of commissioners according to law such recorder's court or county court herein above designated, shall have and exercise the civil jurisdiction hereinafter provided with the right to try and determine civil actions as hereinafter provided.

"Sec. 2. (a) Concurrent jurisdiction with justices of the peace in all civil actions, matters and proceedings including all proceedings whatever, provisional and remedial to civil actions which are now or hereafter may be within the jurisdiction of justices of the peace.

"(b) Concurrent jurisdiction with the Superior Court in all civil actions, matters and proceedings including all proceedings whatever, ancillary, provisional and remedial in civil actions founded on contract or tort, wherein the Superior Court of such county now has exclusive original jurisdiction: *Provided,* that the sum demanded or the value of the property in controversy shall not exceed twenty-five hundred dollars, and the title to real estate shall not be in controversy; and *provided further,* that no injunctive relief may be granted.

"Sec. 18. That all civil causes now pending in Superior Court of such county coming within the provisions of this act, shall be triable in

the court herein provided for in this act and come within the provisions of said act, and it shall be the duty of the clerk of the Superior Court of such county to prepare the calendars and dockets so that the procedure may be had for the trial of said causes as soon as may be.

"Sec. 21. *Provided,* the provisions of this act shall not affect the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Eleventh, Twelfth, Thirteenth, Fourteenth, Fifteenth, Sixteenth, Seventeenth, Eighteenth, Nineteenth, Twentieth Judicial districts."

On 6 April, 1925, the board of commissioners of Durham County, in regular meeting assembled, by resolution duly adopted, conferred civil jurisdiction, as authorized by said act, upon the then existing recorder's court of Durham County, which hitherto had exercised limited jurisdiction in criminal matters, as described in section one of the act above set out.

When the case was called in the recorder's court the defendant entered a special appearance and demurred to the jurisdiction of the court on the ground that it was without authority to hear and determine the cause. Demurrer overruled; judgment for plaintiff; affirmed on appeal to Superior Court, from which latter judgment, the defendant appeals, assigning errors.

McLendon & Hedrick, Basil M. Watkins, W. B. Guthrie and R. H. Sykes for plaintiff.

James Washington Barbee and Brawley & Gantt for defendant.

STACY, C. J. If the Legislature of 1925 thought it wise to confer certain civil jurisdiction on the recorders' courts, already established and existing in the Tenth Judicial District, which hitherto had exercised limited jurisdiction in criminal matters only, as now advised, we see no valid reason why this could not have been done either by general or special act. There is nothing in Art. II, sec. 29 of the Constitution which prohibits the Legislature from increasing or decreasing the jurisdiction of recorders' courts or county courts already in existence. The prohibition is against the *establishment* of courts inferior to the Superior Court, by any local, private or special act or resolution. But when the General Assembly, either by general or special act, undertakes to say that such additional jurisdiction may be conferred on recorders' courts or county courts by the board of commissioners of the county, quite a different question is presented. *Buttfield v. Stranahan,* 192 U. S., 470. See *Machine Co. v. Burger,* 181 N. C., 241, for history of constitutional changes bearing on the matter.

It is provided in Art. IV, sec. 12, of the Constitution that the "General Assembly shall allot and distribute that portion of this (judicial) power and jurisdiction which does not pertain to the Supreme Court

among the other courts prescribed in this Constitution or which may be established by law, in such manner as it may deem best," and it is the position of the defendant here that the body to whose judgment and wisdom this duty of allotment and distribution of judicial powers, inferior to those exercised by the Supreme Court, has been intrusted may not relieve itself of such responsibility by choosing other agencies and delegating it to them. The Constitution plainly commits the authority to the General Assembly, and it is a maxim of constitutional law that when the sovereign power of the State has vested such authority in the Legislature, ordinarily it may not be delegated by that department to any other body or agency. *Field v. Clark*, 143 U. S., 649; *S. v. Young*, 29 Minn., p. 552; *S. v. Sawyer County*, 140 Wis., 634.

The power of local legislation commonly bestowed on municipal and *quasi*-municipal corporations does not trench upon the maxim, "legislative powers may not be delegated, except when authorized by the Constitution," since this is authorized, impliedly at least, by the Constitution itself (Const., Arts. VII, VIII, and IX); and even the maxim is to be understood in the light of an immemorial practice which has always recognized the policy and propriety of vesting such powers in these corporations, being created, as they are, for the purpose of aiding the State government in the business of municipal rule. *S. v. Simons*, 32 Minn., p. 543; *S. v. Young, supra.*

Nor is it a violation of this principle for the Legislature to authorize the board of agriculture to make and prescribe regulations for the quarantine of cattle, or for the inspection of oils sold in the State, and to give to such regulations the force and effect of law. *S. v. Garner*, 158 N. C., 630; *S. v. R. R.*, 141 N. C., 846; *Kimmish v. Ball*, 129 U. S., 217; *Red "C" Oil Mfg. Co. v. Board of Agriculture*, 172 Fed., 695; *S. c.* affirmed, 222 U. S., 380.

Speaking to a similar question in *Board of Education v. Comrs.*, 174 N. C., p. 474, *Hoke, J.*, said: "We are not inadvertent to the position earnestly urged for defendant that the act providing for a determination of the amount required for a four-months school by the Superior Court judge is unconstitutional, in that it attempts to confer legislative powers on the courts, but we do not think the statute is open to such objection. It only empowers the courts to ascertain and determine a disputed fact relevant to a pending issue between the two boards, and thereupon command that the tax be levied accordingly, both the finding of the fact and the judgment thereon being, in our opinion, judicial in their nature. *In re Applicants for License*, 143 N. C., 1 and 6. The tax, however, is authorized, as it should be, by legislative enactment, and is to be levied and collected by the usual and ordinary administrative and executive officers of the county government."

It is not like authorizing the establishment of municipal and county recorders' courts (C. S., 1536 and 1563) by the governing bodies of cities, towns and counties and prescribing in the same or other act what the jurisdiction of said courts shall be when established; for there the allotment and distribution of the judicial powers is made by the General Assembly, and only the question of fact as to whether local conditions render it desirable for the establishment of such courts is referred to the local bodies. *Vista Mills v. City Council,* 60 S. C., 1. Art. IV, sec. 14 of the Const., is as follows: "The General Assembly shall provide for the establishment of special courts, for the trial of misdemeanors, in cities and towns where the same may be necessary." Mr. Cooley in his Constitutional Limitations (6 ed.), p. 137, says: "One of the settled maxims in constitutional law is, that the power conferred upon the legislature to make laws cannot be delegated by that department to any other body or authority. Where the sovereign power of the State has located the authority, there it must remain; and by the constitutional agency alone the laws must be made until the Constitution itself is changed. The power to whose judgment, wisdom, and patriotism this high prerogative has been intrusted cannot relieve itself of the responsibility by choosing other agencies upon which the power shall be devolved, nor can it substitute the judgment, wisdom, and patriotism of any other body for those to which alone the people have seen fit to confide this sovereign trust."

What is, and what is not, legislative power, within the principle of constitutional law we are now discussing, is not always easy to determine. *S. v. Haywood,* 30 S. C., 519. Speaking to the question in *Locke's Appeal,* 72 Pa. St., 491, *Agnew, J.,* said: "Then, the true distinction, I conceive, is this: The legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend, which cannot be known to the law-making power, and must, therefore, be a subject of inquiry and determination outside of the halls of legislation. Hence the necessity of the municipal divisions of the State into counties, townships, cities, wards, boroughs and districts, to which is committed the power of determining many matters necessary, or merely useful, to the local welfare."

Again in *U. S. v. Grimaud,* 220 U. S., p. 517, *Mr. Justice Lamar* observed:

"It must be admitted that it is difficult to define the line which separates legislative power to make laws, from administrative authority to make regulations. This difficulty has often been recognized, and was

referred to by *Chief Justice Marshall* in *Wayman v. Southard,* 10 Wheat., 1, 42, where he was considering the authority of courts to make rules. He there said: 'It will not be contended that Congress can delegate to the courts, or to any other tribunals, powers which are strictly and exclusively legislative. But Congress may certainly delegate to others, powers which the legislature may rightfully exercise itself.' What were these nonlegislative powers which Congress *could* exercise but which might also be delegated to others was not determined, for he said: 'The line has not been exactly drawn which separates those important subjects, which *must* be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details.'

"From the beginning of the Government various acts have been passed conferring upon executive officers power to make rules and regulations—not for the government of their departments, but for administering the laws which did govern. None of these statutes could confer legislative power. But when Congress had legislated and indicated its will, it could give to those who were to act under such general provisions 'power to fill up the details' by the establishment of administrative rules and regulations, the violation of which could be punished by fine or imprisonment fixed by Congress, or by penalties fixed by Congress or measured by the injury done."

The recorder's court of Durham County has been in existence, exercising limited jurisdiction in criminal matters, for some time; as to whether further power and jurisdiction of a civil nature shall be allotted and distributed to it is a question for the General Assembly to decide, and this may not be delegated to the commissioners of Durham County. It will be observed that the present act does not purport to confer civil jurisdiction on recorders' courts, leaving only to the commissioners of the respective counties the decision as to whether local conditions make it desirable to bring their county within the operation of the law; but the discretion and power to confer limited civil jurisdiction is by the act expressly delegated to the local bodies. This is clearly a delegation of legislative power and cannot be upheld.

As said in *Field v. Clark,* 143 U. S., 649: "The legislature cannot delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend which cannot be known to the law-making power, and must, therefore, be a subject of inquiry and determination outside of the halls of legislation." See, also, *Caha v.*

United States, 152 U. S., 211; *United States v. Bailey,* 9 Pet. 238; *Cosmos Co. v. Gray Eagle Co.,* 190 U. S., 309; *Oceanic Navigation Co. v. Stranahan,* 214 U. S., 333; *Roughton v. Knight,* 219 U. S., 537; *Smith v. Whitney,* 116 U. S., 167; *Ex parte Reed,* 100 U. S., 22; *Gratiot v. United States,* 4 How., 81.

The authority to make administrative rules is not a delegation of legislative power, nor are such rules raised from an administrative to a legislative character because the violation thereof is punished as a public offense. *U. S. v. Grimaud, supra.*

Our present position in no way conflicts with what was said in *S. v. Lytle,* 138 N. C., 738; *Rhyne v. Lipscombe,* 122 N. C., 650; *S. v. Moore,* 104 N. C., 743; *Mott v. Comrs.,* 126 N. C., 866, and numerous other cases of similar character. On the other hand, by correct interpretation, these decisions are in full support of the conclusion announced herein. See, also, *Berry v. Durham,* 186 N. C., p. 426; *Lacy v. Bank,* 183 N. C., 373; *Bost v. Cabarrus,* 152 N. C., 531; *Smith v. School Trustees,* 141 N. C., 143.

In reply to the argument that the present delegation of legislative power is authorized by the Constitution itself, in that it is provided the General Assembly shall allot and distribute such power and jurisdiction, "in such manner as it may deem best," it is sufficient to say that this phrase gives the Legislature full discretion as to what allotment and distribution shall be made of that portion of the judicial power and jurisdiction not pertaining to the Supreme Court; but the allotment and distribution, it will be observed, is to be made by the General Assembly, and this may not be delegated to any other body or agency. See *Buttfield v. Stranahan,* 192 U. S., 470, as reported in 48 L. Ed., 525, and cases there cited in plaintiff's brief on page 531.

The distinction is very well pointed out by *Hoke, J.,* in *S. v. Dudley,* 182 N. C., 822, as follows:

"It is well recognized that except in the case of municipal corporations when in the exercise of governmental functions on local matters, legislative power may not be delegated. But if it be conceded that the board in question here, the Fisheries Commission Board, as a mere administrative board does not come within the exception stated, it is firmly established in this jurisdiction and fully recognized in authoritative cases elsewhere that, though legislative powers may not be in strictness delegated to a board of that character, it is fully competent for the Legislature to delegate to such a board the power to 'establish the pertinent facts or conditions upon which a statute makes its own action depend.' This statement of the principle taken from 8 Cyc., p. 830, was directly approved and applied in *S. v. R. R.,* 141 N. C., 846-851, a decision upholding the conviction of defendant for violation of the

administrative regulations of our Department of Agriculture. And a forcible and striking illustration in approval of the same position is presented in the recent case of *S. v. Hodges,* 180 N. C., 751, sustaining regulations of the same department in reference to eradication of cattle ticks. It has been applied also in reference to regulations of the health department as in the case of compulsory vaccination. *Morgan v. Stewart,* 144 N. C., 424, citing *S. v. Hay,* 126 N. C., 999; *Hutchins v. Durham,* 137 N. C., 68; *Morris v. Columbus,* 102 Ga., 792. And in *Express Co. v. R. R.,* 111 N. C., 463, it was fully recognized as justifying the Legislature in delegating to the Corporation Commission the power to establish transportation rates, etc. Similar decisions resting upon the same principle appear in *U. S. v. Grimaud,* 220 U. S., 506; *Isenhour v. State,* 157 Ind., 417, and in many other authoritative cases, and may be considered as the generally accepted rule on the subject."

The defendant's motion should have been allowed. The cause must be tried in the Superior Court which alone has jurisdiction to hear and determine it.

Reversed.

O. B. EATON v. W. B. DOUB ET AL.

(Filed 24 June, 1925.)

1. Judgments—Liens—Deeds and Conveyances—Registration—Statutes—Color of Title.

The possession of a grantee under an unregistered deed of lands is not under color of title as against subsequent judgment creditors of his grantor, who have thus obtained their liens on the *locus in quo,* the source of title being a common one. C. S., 3309.

2. Same—Betterments.

As against the judgment creditors of a grantor of lands, where the grantee has entered upon the *locus in quo* and made valuable improvements before the docketing of the judgments, the grantee cannot establish his rights to betterments. C. S., 3309, 699, 677.

3. Same—Purchasers for Value.

The grantee under an unregistered deed is not a purchaser for value as against the judgment creditors of his grantor who have acquired their liens on the land subsequent to the entry and possession of the grantee.

APPEAL by plaintiff from *McElroy, J.,* at November Term, 1924, of FORSYTH.

From judgment sustaining demurrer *ore tenus* to his complaint, on the ground that no cause of action is set out therein, plaintiff appealed to the Supreme Court.

Manly, Hendren & Womble and Parrish & Deal for plaintiff.
Holton & Holton and Swink, Clement & Hutchins for defendants.

CONNOR, J. The facts alleged in the complaint are as follows: On 21 May, 1909, in consideration of one thousand dollars, the Engle Land Company conveyed to plaintiff, by deed, a lot of land situate in the city of Winston-Salem. Plaintiff immediately went into possession of said lot and within three months thereafter constructed thereon a large dwelling-house which he has continuously, since 1909 to the present time, occupied as his home. During the fall of 1919 plaintiff placed a house on said lot and made thereon many improvements, which have greatly enhanced its value. These improvements were made in good faith by plaintiff, relying upon his belief, bona fide, that he had a good, indefeasible and unencumbered title to said lot. On 6 June, 1923, plaintiff conveyed a portion of said lot to the Burkhead Methodist Church, South, by deed containing full covenants of warranty. Said church thereafter erected a parsonage on the portion of the lot conveyed to it, at a cost of approximately nine thousand dollars. Plaintiff's possession of said lot has been open, adverse, notorious, and exclusive, from and since the date of his deed from the Engle Land Company. This deed was dated 21 May, 1909, and was duly registered in Forsyth County on 9 September, 1924. At the date of the execution of said deed, Lindsay Patterson, a lawyer, residing in Winston-Salem, of high standing and repute, both morally and financially, was the president of the Engle Land Company and the owner of practically all of the stock of said company. Plaintiff, relying upon the friendly and cordial relations existing between the said Patterson and himself, and upon his confidence in him, did not register his deed, at the time he received it, and thereafter forgot that he had failed to do so, until September, 1924.

Defendants are judgment creditors of plaintiff's grantor, the Engle Land Company. Their judgments were obtained against the Engle Land Company and Lindsay Patterson, and were duly docketed on the judgment docket of the Superior Court of Forsyth County, during the year 1922. These judgments, aggregating, with interest, about twelve thousand dollars, were all docketed prior to the date of the registration of the deed of the Engle Land Company to plaintiff. The indebtedness upon which each of the judgments was obtained was incurred subsequent to 1 January, 1917, and was the indebtedness of Lindsay Patterson and not of the Engle Land Company; credit was extended by defendants to him and not to the company. He completely dominated and controlled the affairs and policies of the company, using the name of the company as a party to the obligations upon which judgments were rendered, as a form. At the time the obligations were incurred to defendants, said

company owned an inconsiderable amount of property, having theretofore disposed of practically all its property, consisting of land, which Patterson, through said company, had put on the market for sale.

The value of the land, less the enhanced value thereof by reason of said improvements, is substantially less than the amount of the docketed judgments of defendants, and is not in excess of six thousand dollars, whereas the value of the property, with the improvements, is substantially in excess of the sum of six thousand dollars.

Two of defendants have caused, and the others, unless restrained by order of court, will cause executions to be issued upon the said judgments in their favor to the sheriff of Forsyth County; and said sheriff has advertised for sale, for the satisfaction of said judgments, all the right, title and interest of the Engle Land Company in and to said land. Plaintiff prays judgment, first, that defendants be restrained and enjoined from proceeding further with the executions issued and now in the hands of the sheriff and from suing out further executions upon said judgments, and that said judgments be canceled and declared null and void as to the land described in the complaint; and second, that if the court shall adjudge that said judgments are liens upon said land, upon payment by plaintiff into the office of the clerk of the Superior Court of Forsyth County of such sum as may be adjudged as the value of said land, less the enhanced value by reason of the improvements, each and all said judgments, in so far as the land described in the complaint is concerned, be canceled.

No answer to the complaint has been filed by defendants; upon the hearing of a motion by plaintiff, for the continuance of a temporary restraining order to the trial, defendants demurred, *ore tenus,* to the complaint. By the demurrer, defendants admit the facts to be as alleged in the complaint; *Hayman v. Davis,* 182 N. C., 563; *Hipp v. Dupont,* 182 N. C., 9. All relevant facts sufficiently pleaded in the complaint are admitted by a demurrer, *ore tenus. Public Service Co. v. Power Co.,* 179 N. C., 18; *Bank v. Bank,* 183 N. C., 463; *Ollis v. Furniture Co.,* 173 N. C., 542.

Plaintiff's deed, registered 9 September, 1924, is not valid as a conveyance by the Engle Land Company, of the land described therein, as against defendants, creditors of Engle Land Company, whose claims have been reduced to judgments. C. S., 3309. The land described in the deed, not having been conveyed to plaintiff, as against defendants, was the real property of the Engle Land Company at the date of the docketing of the judgments. The judgments, docketed on the judgment docket of the Superior Court of Forsyth County, are liens upon said land. C. S., 614. They were liens on said land at date of the registration of plaintiff's deed, and plaintiff's title, under the deed as a conveyance,

is subject to the liens of the judgments. *Wimes v. Hufham,* 185 N. C., 178; *Mills v. Tabor,* 182 N. C., 722; *Realty Co. v. Carter,* 170 N. C., 5; *Trust Co. v. Sterchie,* 169 N. C., 21; *Tarboro v. Micks,* 118 N. C., 162; *Bostic v. Young,* 116 N. C., 766.

The fact that defendants recovered judgments not only against the Engle Land Company, but also against Lindsay Patterson, and that the indebtedness upon which the judgments were recovered was his indebtedness, and not that of the company, as alleged in the complaint and admitted by the demurrer, cannot be held to affect the validity of the judgments, or the right of defendants to enforce the same, by execution and sale of the real property of the Engle Land Company, upon which the judgments are liens. Nor is the validity of the liens affected by the fact that the indebtedness upon which the judgments were rendered was incurred subsequent to 1 January, 1917, at which time plaintiff had been in possession of the land under an unregistered deed for more than seven years. There is no allegation that the judgments were void, for want of jurisdiction, or that they were procured by fraud, or that the indebtedness upon which they were rendered was fraudulent. Defenses which may have been made by the Engle Land Company before judgment, are not now available to said company or to plaintiff; *Brown v. Harding,* 170 N. C., 253; 34 C. J., 527; 15 R. C. L., 731. The judgments are valid; plaintiff's deed for the land was not a conveyance of the land by the Engle Land Company as against defendants whose judgments were docketed prior to the date of its registration; the judgments are liens upon the land, as the real property of the Engle Land Company; plaintiff's deed from said company is no bar as a conveyance to the right of defendants to have the land sold, under execution, as the property of the Engle Land Company.

Plaintiff, conceding that, upon the record, his deed is not a valid conveyance of the land by the Engle Land Company as against defendants, judgment creditors, whose judgments were docketed prior to the registration of the deed, contends that he had title to said land at time the judgments were docketed, by possession, for seven years, under the unregistered deed, as color of title. C. S., 428. The facts of possession, and of the requisite duration of such possession, prior to the docketing of the judgments, are admitted. This contention, therefore, presents the question as to whether an unregistered deed of the judgment debtor is color of title to the land described therein as against a judgment creditor whose judgment has been duly docketed, and thus becomes a lien on the land described in the deed.

Both plaintiff, the grantee in the unregistered deed, and defendants, judgment creditors, whose docketed judgments are liens on the land, claim from a common source, to wit, the Engle Land Company. Under

C. S., 3309 no conveyance of land is valid as against creditors or purchasers for value, but from the registration thereof.

In *Collins v. Davis,* 132 N. C., 106, this Court said: "We, therefore, hold that where one makes a deed for land, for a valuable consideration, and the grantee fails to register it, but enters into possession thereunder, and remains therein for more than seven years, such deed does not constitute color of title and bar the entry of a grantee in a subsequent deed for a valuable consideration, who has duly registered his deed." "Except in cases coming within this rule, the rights acquired by adverse possession for seven years under color of title are not disturbed or affected by the act of 1885" (now C. S., 3309). *Roberts v. Massey,* 185 N. C., 164.

In *Janney v. Robbins,* 141 N. C., 400, *Justice Hoke,* approving the principle announced in *Collins v. Davis, supra,* when confined to the facts of the case in which it was applied, writing for the Court, says that this principle does not extend to a claim by adverse possession held continuously for the requisite time under deeds foreign to the true title or entirely independent of the title under which plaintiff makes his claim. He says, referring to the act of 1885 (Connor Act, now C. S., 3309), "The law was enacted in order to establish and declare the rights of persons who claim under the same title, intended to be the true title, or the one presumably the true title, because both parties claim under a common grantor, and it undertook to do this by simply applying to deeds, and contracts concerning realty and leases of land of over three years duration, the same provisions that had long prevailed as to mortgages, to wit, that no such instrument should be valid to pass the property as against creditors or purchasers for value, but from the registration thereof." *Bradford v. Bank,* 182 N. C., 225.

In *Moore v. Johnson,* 162 N. C., 266, *Justice Walker* cites and approves *Collins v. Davis* and *Janney v. Robbins,* and says with reference to the law as declared in the opinion in these cases: "The Court did say in both these cases that the doctrine of color of title is not modified, except to the extent stated, that is, where the parties claim from the same source of title, and in cases coming strictly within the principle, and that when they do not so claim but derive their alleged right from independent sources, the doctrine of color of title, with respect to an unregistered deed, still exists." See *Hunter v. Kelly,* 92 N. C., 285. In *King v. McRackan,* 168 N. C., 621, it is held that "one relying upon a registered deed to show title as against a third person, claiming the lands by adverse possession under color of title, is required to allege and prove that he is a purchaser for value." An unregistered deed is, therefore, color of title, as against the grantee in a registered deed, who claims from a source independent of and foreign to the source from

which the grantee in the unregistered deed claims, or as against a grantee in a registered deed, claiming from the common source who is not a purchaser for value. An unregistered deed is not color of title as against the grantee in a registered deed, who claims from the same source as the grantee in the unregistered deed, and who is a purchaser for value.

Counsel for plaintiff, in their very helpful brief, concede the law to be settled that with respect to purchasers for a valuable consideration from a common grantor, who record their deeds, the unregistered deed of a prior purchaser is not color of title. Possession, therefore, under an unregistered deed, although of the requisite kind and for the requisite duration, will not bar the grantee in a subsequent deed, who is a purchaser for value, from the same grantor, and who has duly registered his deed. *Buchanan v. Hedden,* 169 N. C., 222; *Sills v. Ford,* 171 N. C., 733; *Kluttz v. Kluttz,* 172 N. C., 622; *Lanier v. Lumber Co.,* 177 N. C., 200; *Clendenin v. Clendenin,* 181 N. C., 470. (*Clark, C. J.,* dissenting opinion.)

No distinction is made in the statute (C. S., 3309) or in the opinions of this Court, construing and applying the statute, between creditors and purchasers for value. No conveyance of land is valid to pass any property from the donor or grantor, as against either creditors or purchasers for value, but from the registration thereof. As to a purchaser for value, who has recorded his deed, it has been held that a prior deed from the same grantor, unregistered, does not exist, as a conveyance or as color of title. We can discover no principle and no authority which requires or justifies such distinction in the construction or application of the statute as will support plaintiff's contention.

We, therefore, hold that where there are conflicting claims to land, between a judgment creditor of the grantor and his grantee, although for a valuable consideration, whose deed is dated prior to but not registered at the date of the docketing of the judgment, the unregistered deed is not color of title as against the judgment creditor, and possession thereunder, although of the requisite kind and for the requisite duration, will not bar the judgment creditor from selling under execution the land described in the deed, as the real property of the judgment debtor.

There was no error in sustaining the demurrer to the complaint, in so far as plaintiff relies upon the facts alleged therein as supporting his first prayer for relief; the docketed judgments of defendants are valid liens upon the land described in the complaint; plaintiff is not entitled to judgment that defendants be restrained from subjecting all the right, title and interest of the Engle Land Company in and to said land by sale, under execution to the payment of said judgments.

Plaintiff contends, however, that the demurrer should not have been sustained, for that he is entitled, in this action, to relief in accordance with his second prayer for judgment, to wit, that the value of the land, at the date of the docketing of the judgments, when they became liens thereon, should be determined, exclusive of the amount by which same was enhanced by the improvements made by him, while in possession, in good faith, relying upon his unregistered deed, and that upon the payment by him of the amount of such value, into court, to be applied on said judgment, the land should be released from the liens of same. Defendants rely upon *Tarboro v. Micks,* 118 N. C., 162, as authority against the contention.

In that case, Battle Bryan, in consideration of $3,300, on 27 December, 1887, conveyed by deed to plaintiff a lot of land; plaintiff by the erection thereon of a handsome and commodious public hall greatly enhanced the value of said lot; at Spring Term, 1888, of the Superior Court of Edgecombe County, a judgment owned by defendant was rendered against Bryan and duly docketed; plaintiff's deed was registered 10 January, 1910. Plaintiff sought to restrain defendant from selling said lot under execution upon said judgment, claiming the right to compensation for betterments. The court below was of the opinion "that defendant, the owner of the judgment, has the right to treat the conveyance dated 27 December, 1887, as not having been made until the date of its registration,—10 January, 1910—without regard to the question of notice; that, as for plaintiff's right to compensation for betterments, the same can be adjusted when the purchaser at execution sale brings his action of ejectment; that plaintiff having an adequate legal remedy, is not entitled to extraordinary relief by way of injunction, and that the restraining order herein issued be vacated." Upon the appeal, this Court said: "We can see no error in the rulings of his Honor." This case is determinative of the instant case, certainly in so far as plaintiff relies for relief upon C. S., Art. 29, ch. 12, known as the "Betterments Statute." C. S., 699 *et seq.* There was no error in holding that plaintiff is not entitled to relief under this statute. He cannot, clearly in this action, avail himself of its provisions. The language of the statute and the decisions of this Court forbid. *Trust Co. v. Sterchie,* 169 N. C., 21; *Realty Co. v. Carter,* 170 N. C., 6.

The facts of the instant case appeal so strongly to the conscience of the Court that we are reluctant to hold that the court was without power to afford any relief to plaintiff upon the facts alleged by him and now admitted, upon the demurrer, by defendants. We should be glad to emulate the wisdom of Portia, who in rendering judgment in the action pending before her, gave to plaintiff who "craved the law" his "pound of flesh," but no more.

Defendants, as judgment creditors of the Engle Land Company, are entitled to have, in satisfaction of their judgments, the proceeds of the sale, under execution, of all the right, title and interest of their judgment debtor in and to the land, upon which the judgments are liens. C. S., 677. The sheriff's deed would pass to the purchaser at the execution sale all the right, title and interest which the Engle Land Company had not conveyed, as against defendants, to plaintiff by his deed which was unregistered; C. S., 698, 671; and which, notwithstanding said deed, remained in said company. Said purchaser would also acquire all rights of defendants in said land; *Fibre Co. v. Cozad,* 183 N. C., 600. He would derive his title from and hold under the Engle Land Company; *Bristol v. Hallyburton,* 93 N. C., 384; *Gentry v. Callahan,* 98 N. C., 448; *Electric Co. v. Engineering Co.,* 128 N. C., 199; *Kochs v. Jackson,* 156 N. C., 326; 23 C. J., 746. Defendants are entitled to the value of the interest of the Engle Land Company, in said land, for this the purchaser at the execution sale would get under his deed. It is intimated, though not directly decided in *Tarboro v. Micks,* that as against such purchaser, plaintiff would be entitled to betterments.

In *Wood v. Tinsley,* 138 N. C., 507, it is held that "since the Connor Act (Laws 1885, ch. 147, now C. S., 3309), one who goes into possession of land, under a parol contract to convey, paying the purchase money and making improvements thereon, cannot assert the right to remain in possession until he is repaid the amount expended for purchase money and improvements as against a purchaser for value from the vendor, under a duly registered deed." As to a purchaser for value, from the common grantor, this rule applies to one in possession, under unregistered deed, who has enhanced the value of the land, by improvements, although made in good faith. Public policy, as declared in C. S., 3309, forbids. The statute, upon which all may rely, cannot be waived for the relief of an individual who has disregarded it.

Defendants, however, are not purchasers for value from the Engle Land Company; they have no estate in said land; they have only liens, which may be enforced by sale under execution. *Bruce v. Nicholson,* 109 N. C., 202; *Bryan v. Dunn,* 120 N. C., 36. They are, however, liens by virtue of the statute, C. S., 614, and all men may rely upon the provisions of the statute. Subject to these liens, plaintiff is the owner, in fee, of all the right, title and interest in and to the land of the Engle Land Company. While in possession, prior to date of docketing the judgments, and without notice of the rights of defendants, by improvements placed on the land by the expenditure of his labor and money he enhanced the value thereof.

It has been held that C. S., 3309, applies only to conveyances, contracts, and leases of land, which must be in writing, and may, therefore,

be registered. Rights and titles, which need not be evidenced by writing, resting upon approved principles of equity and enforceable by the court in the exercise of its equitable jurisdiction, are not affected by the statute; a grantee in a registered deed may be held to have taken and to hold his title subject to such equities. *Sills v. Ford,* 171 N. C., 733; *Pritchard v. Williams,* 175 N. C., 319; *Roberts v. Massey,* 185 N. C., 164; *Spence v. Pottery Co.,* 185 N. C., 218.

Is one in possession of land under a deed valid as a conveyance against his grantor, but not valid as against judgment creditors of such grantor, because not registered at date of docketing of judgments, entitled to compensation out of the proceeds of the sale of said land prior to the rights of the judgment creditors for the amount by which the value of the land has been enhanced by permanent improvements made thereon by such grantee before notice of rights of the judgment creditors?

The equitable jurisdiction of the Superior Courts of this State has been frequently invoked by vendees of land who, while in possession under parol contracts to convey, void under the Statute of Frauds (C. S., 988), have enhanced the value thereof by permanent improvements and have thereafter been called upon to surrender possession by vendors who have repudiated their parol contracts. This Court, by a long line of decisions, has sustained the jurisdiction to afford relief by requiring compensation for such enhancement in value before aiding such vendors to recover possession of the land. *Baker v. Carson,* 21 N. C., 381; *Albea v. Griffin,* 22 N. C., 9; *Dunn v. Moore,* 38 N. C., 364; *Love v. Neilson,* 54 N. C., 339; *Daniel v. Crumpler,* 75 N. C., 184; *Hedgepeth v. Rose,* 95 N. C., 45; *Pitt v. Moore,* 99 N. C., 85; *Tucker v. Markland,* 101 N. C., 422; *Vann v. Newsome,* 110 N. C., 122; *Carter v. Carter,* 182 N. C., 186, and many other cases. The principle upon which the jurisdiction has been sustained is well stated by *Walker, J.,* in *Jones v. Sandlin,* 160 N. C., 150. "The general rule is that if one is induced to improve land under a promise to convey the same to him, which promise is void or voidable, and after the improvements are made he refused to convey, the party thus disappointed shall have the benefit of the improvements to the extent that they increased the value of the land," citing many authorities. An examination of these cases will show that the application of the principle has been broad and liberal, waiving technical objections, and doing justice upon the facts of the particular case in which it has been applied. However, in each case the conduct of the vendor has been such as to cause the Court to hold that denial of relief would be to aid the vendor to perpetrate a fraud. *Davis, J.,* in *Pitt v. Moore,* 99 N. C., 85, said: "Whatever may

have been the ancient rule, it is now well settled by many decisions from *Baker v. Carson,* 21 N. C., 381, in which there was a divided Court, *Ruffin, C. J.,* and *Gaston, J.,* concurring, and *Albea v. Griffin,* 22 N. C., 9, by a unanimous Court, to *Hedgepeth v. Rose,* 95 N. C., 41, that where the labor or money of a person has been expended in the permanent improvement and enrichment of the property of another by a parol contract or agreement which cannot be enforced because, and only because, it is not in writing, the party repudiating the contract, as he may do, will not be allowed to take and hold the property thus improved and enriched without compensation for the additional value which these improvements have conferred upon the property, and it rests upon the broad principle that it is against conscience that one man shall be enriched to the injury and cost of another, induced by his own act." In *Luton v. Badham,* 127 N. C., 96, it is said that it is "the fraud that gives the action, not the possession."

In the instant case there has been no conduct on the part of defendants to induce plaintiff to make the improvements; as against defendants, plaintiff has no equity to aid him. While making the improvements, plaintiff had no notice of the possible claims of defendants, but he was fixed with notice by the statute that as long as he kept his deed from the record his title to the land was subject to the rights of subsequent grantees of the Engle Land Company for value, who recorded their deeds, and to the rights of creditors who reduced their debts to judgments and duly docketed the judgments.

We are unable to discover any equity upon which we can apply this just and beneficent principle to the relief of plaintiff in this action. As said in *Wood v. Tinsley,* 138 N. C., 507, equity follows the law. The law sustains the contention of defendants that plaintiff has stated no cause of action against them in his complaint. As against them, plaintiff cannot recover judgment as prayed for, either under the statute or under the equitable jurisdiction of the Court.

If improvements had been made on the land by the Engle Land Company prior to the docketing of the judgments, they would have simply increased the value of the property upon which the judgments became liens at date of docketing. Plaintiff, to whom all the title of the Engle Land Company passed, subject to the rights of purchasers for value, who recorded their deeds, or of judgment creditors, who docketed their judgments, stands in the shoes of his grantor, and has no greater rights and is subject to no less burdens, as against defendants; *Wharton v. Moore,* 84 N. C., 479; *Pritchard v. Williams,* 178 N. C., 445 (*Allen, J.,* dissenting opinion); 31 C. J., 311, and cases cited, n. 52. The improvements were made by plaintiff on his own

land as between him and his grantor and all other persons except defendants; as to defendants, however, they were made upon the land of another. In 31 C. J., 319, it is said: "As a general rule, in order that one may recover compensation for improvements made on another's land, even in a court of equity it is necessary that he shall have made such improvements in good faith while in bona fide adverse possession of the land under color of title." Plaintiff's possession as against defendant was not under color of title; he, therefore, cannot recover in this action, and it seems that he could not sustain his right to compensation in an action of ejectment by the purchaser of the land at the execution sale.

We cannot refrain from expressing regret that, after a careful consideration of this case, we are unable to arrive at any other conclusion than that no cause of action is stated in the complaint, and that in sustaining the demurrer on that ground there was no error. The judgment must be

Affirmed.

C. W. GODFREY v. WESTERN CAROLINA POWER COMPANY AND SOUTHERN POWER COMPANY.

(Filed 24 June, 1925.)

1. Evidence—Motions—Nonsuit—Questions for Jury—Ponding Water—Electricity.

In an action for damages to the health of plaintiff and his family alleged to have been caused by malaria carried by the bites of certain kinds of mosquitoes, there was expert medical evidence tending to show, and *per contra*, that the proximate cause of plaintiff's damage was the breeding of these mosquitoes by the intermittent lowering of the water level above and below the ponding of a dam used by defendant in generating electricity, from stagnant pools of water among trees and undergrowth negligently left by the defendants growing upon the watershed: *Held*, upon defendant's motion to nonsuit, sufficient to take the case to the jury upon the issue of defendant's actionable negligence.

2. Same—Experts—Opinion Evidence—Issues.

Held, the expert evidence in this case supplemented the common knowledge of the jury and nonexpert testimony, and was a material and additional aid to the jury in determining the issue of defendant's actionable negligence, and was not objectionable as involving the question of negligence which alone it was the jury's province to determine.

3. Same—Leases—Estoppel—Appeal and Error.

Under the evidence of this case: *Held*, a lease by the defendant to the plaintiff of an unused portion of the land on the watershed of the stream

for the supply of water to a ponded expanse used by the defendant in generating electricity to be sold to the public, by its terms was not intended to exclude the plaintiff from recovering damages for impaired health caused by the manner in which the water was ponded.

4. Evidence—Ponding Water—Appeal and Error.

In an action to recover damages for injury to health alleged to have been caused by ponding water for generating electrical power: *Held*, evidence for defendant that there was no general epidemic at the time, or at another pond some distance off, is properly excluded.

5. Same—Rebuttal Evidence.

It was competent for the plaintiff to offer evidence in rebuttal of defendant's evidence tending to show that the malaria-bearing mosquitoes were found outside a greater area than covered by the *locus in quo* upon the question as to whether the plaintiff and his family were caused to have malaria as a result of the defendant's ponding water for the generating of electricity under the circumstances of this case.

APPEAL by defendants from *Finley, J.*, at June Term, 1924, of MCDOWELL.

The action was brought for the recovery of damages for injury to the plaintiff's health, alleged to have been caused by the negligence of the defendants. The theory upon which the action is prosecuted will appear from the following summary of the plaintiff's allegations.

The Southern Power Company, a foreign corporation, is engaged in the business of producing, distributing, and selling hydro-electric power in North Carolina and other States, and the Western Carolina Power Company was created and organized as a subsidiary domestic corporation for the purpose of developing and improving the water power on Catawba River, Paddy's Creek, and Linville River, in Burke County; of impounding a reserve supply of water for initial or primary use in the production of such hydro-electric power; of regulating the flow of the water, and of supplying to the water-power plants of the Southern Power Company an increased flow during periods of drought and low water. A few years ago the defendants erected three dams approximately 125 feet in height across Catawba River, Paddy's Creek, and Linville River, thereby impounding the water, which is connected by canals across the intervening water divides so as to make one continuous body. The power station is located at the dam on Linville River. The surface area of the artificial lake thus created exceeds ten thousand acres, and the shore line when the lake is full exceeds one hundred miles; but when the stored water is drawn upon in seasons of drought, both the area and the shore line are largely reduced. The lake is intersected by a number of small streams and ravines, varying in width and extending back into the hills and mountains; and in the

upper reaches of the lake the water is very shallow, vast areas being only a few inches in depth. The shallow waters tend more and more to be obstructed and to become stagnant through the incessant growth of vegetation, and in the small streams and ravines connecting with the lake are depressions or sags which are flooded in seasons of high water and left stagnant when the water is low. The defendants have diverted the flow of Catawba River and Paddy's Creek into the dam on Linville River, where the water is released into the channel of Linville River, and in this way have left numerous ponds and pools of stagnant water in the unused channels below the dams. This whole region was free from malarial diseases before the dams were erected, and it was the duty of the defendants in constructing the dams and ponding the water so to prepare the area to be flooded that malarious conditions would not result; to destroy all timber growth, underbrush, and other vegetable growth upon the areas to be flooded and to keep said areas free from such growth, and to install and maintain an adequate system of drainage. The defendants negligently failed to perform their duty in these respects; negligently failed to remove the timber growth, underbrush, and other vegetable growth on the area covered by the lake; negligently failed to provide for the drainage of said area and the channels of said streams; negligently left within the area of the lake large quantities of timber growth, through the accumulation of which in the shallow waters the free circulation of the water in the upper reaches of the lake is obstructed and prevented; negligently allowed stagnant water and great quantities of vegetable matter to remain there, by reason whereof the shallow waters were shaded and corrupted and the vegetable matter left to decay. By reason of such neglect of duty an unwholesome, unhealthy, and malarious condition was set up in all the upper reaches of the lake and in the adjacent country; malaria-bearing mosquitoes are propagated in all the margins of the lake and in the ponds and pools along the channels of said streams; chills and fever and other malarial sickness became epidemic, and the entire region, noted for its healthfulness before the construction of the dams, was thereby made unhealthy and subjected to malarial infection and disease. By reason of the defendant's negligence the plaintiff has been infected with malaria and so run down in health that he is unable to do manual labor, has suffered loss of time, incurred expense, and greatly suffered in mind and body. The plaintiff's wife and children have also suffered in like manner from the same cause.

The defendants filed an answer denying all the material allegations of the complaint, and set up an alleged estoppel against the plaintiff arising out of the terms of a lease, to which reference is made in the opinion.

The issues were answered as follows:

1. Was the plaintiff injured by the negligent conduct of the defendants, as alleged in the complaint? Answer: Yes.

2. What damages, if any, is the plaintiff entitled to recover? Answer: $4,000.

3. If the plaintiff was injured, as alleged in the complaint, is he estopped from bringing this action by reason of the stipulations contained in the lease offered by the defendants? Answer: No.

Judgment for the plaintiff. Defendants appealed, assigning error.

Morgan & Ragland and Carter, Shuford, Hartshorn & Hughes for plaintiff.

Hudgins & Watson, Pless, Winborne & Pless, R. S. Hutchison and W. S. O'B. Robinson, Jr., for defendants.

ADAMS, J. The foundation of legal liability for the creation or maintenance of a nuisance is ordinarily not so much the degree of care that is used as the degree of danger that exists even with the best of care, while the ground of civil liability for negligence is injury to person or property when such injury is not the result of premeditation and formed intention. 20 R. C. L., 6. It is not essential to a disposition of the exceptions to decide whether the complaint should be regarded as based on one or both these grounds, for the theory adopted on the trial was the defendants' negligent failure to perform a legal duty which they owed the plaintiff, and one of the main defenses was the insufficiency of the evidence in any view to subject the defendants, or either of them, to any kind of legal liability.. This defense the appellants presented by a demurrer to the evidence or a motion for nonsuit. Whether the demurrer should have been sustained or the motion granted we are now to determine.

The substance of the plaintiff's allegations is set forth in the statement of facts. For him it is contended in brief that the defendants' failure to exercise due care in the construction and maintenance of their works and in the ponding of the water proximately caused the spread of the infection and brought about the plaintiff's impaired health and anemic condition.

Several witnesses introduced as experts in medicine and sanitation expressed their opinion as to the types of malaria, the way in which it is contracted, its effects, and the means of prevention. The scientific theory of causation, it was said, is a microscopic parasite injected into the blood by the bite of the Anopheles mosquito. It has been demonstrated, according to the testimony, that if a mosquito of this variety bite a person suffering from malaria, and after the parasite is devel-

oped in the salivary gland bite a healthy person, the latter will in due time develop malaria. The converse also is true: persons who are protected from mosquito bites escape malaria. When this organism or parasite gets into the red corpuscles of the blood it develops into a larger organism which breaks up into a number of parts, and in this way disrupts the corpuscles and turns the poison loose in the body.

There is evidence to the effect that of the three known malaria-bearing mosquitoes (Anopheles), only two are found in the region covered by the lake. These two are the Punctapennis and the Quadrimaculatus, benevolently abbreviated by the witnesses to "punc" and "quad." There is further evidence that four things are essential to the production of the disease: the Anopheles mosquito, propagation, a person infected with the parasite, and a person who is well.

This summary accentuates the pivotal question arising on the defendants' demurrer to the evidence. They say that the Quadrimaculatus breeds in ponds and lakes and the Punctapennis along the banks of running streams and in small pools adjacent to streams where the water eddies; that both species had been found along the ravines and streams now covered by the lake long before the water was impounded; that neither species has ever been found in the defendants' lake or in any place connected with their works, and that the plaintiff was infected by mosquitoes that had been propagated in streams and other natural breeding places entirely disconnected with the defendants' property. Moreover, they contend that the disease was transmitted from infected laborers who had come from malarial sections of the South to aid in the construction of the dams, and that the defendants, therefore, in no view of the evidence, caused or contributed to the outbreak of the malady.

On the other hand, the plaintiff contends that up to the time the lake was built the whole community had been free from malaria; that the first outbreak occurred in the summer of 1919 after the water had been backed five or six miles up the coves and valleys; that sporadic cases of the disease previously occurring were traceable to the victim's temporary sojourn in distant malarial regions; that before the water was ponded the Anopheles mosquito had not propagated to an appreciable extent in that part of the State, but since that time both species have been found breeding along the margin of the lake and in pools of stagnant water left open by the defendants; that the importation of labor was a negligible and uncertain factor; that the Anopheles mosquito would not have bred on the lake if the banks had been free from vegetation; that the defendant was negligent in failing to remove from the margin grass, vines, bushes, dead trees, and masses of second growth which protected the breeding places and in failing to drain or other-

wise protect the small bodies of water standing in and near the old channels below the dams; and that as a proximate result of such negligence the plaintiff, his wife, and their children were infected with malaria and have suffered its attendant evils.

We find in the record evidence tending to sustain each of the inconsistent theories advanced by the respective parties. Under these circumstances, we need hardly repeat the legal truism that the plaintiff is entitled to the most favorable view of the evidence and to the benefit of any circumstances it tends to establish, and that a demurer to the evidence or a motion for nonsuit can be sustained only when the evidence in no aspect is sufficient in law to warrant a verdict for the plaintiff. The authorities to this effect are so numerous and so familiar as scarcely to call for citation. *Allen v. Garibaldi,* 187 N. C., 798; *Hancock v. Southgate,* 186 N. C., 278; *Rush v. McPherson,* 176 N. C., 562.

On behalf of the defendants it was argued that the plaintiff's illness may have resulted from one of several causes, for some of which, at least, they were not responsible, and that the plaintiff must fail because the evidence does not trace his ailment to the defendants' negligence. In support of this position the defendants cite *Rice v. R. R.,* 174 N. C., 268; *Cobb v. Fogalman,* 23 N. C., 441; *Wittkowsky v. Wasson,* 71 N. C., 451; *S. v. Powell,* 94 N. C., 965. But the plaintiff's evidence, as indicated, was sufficient to carry the case to the jury and, if accepted, to warrant the verdict. His Honor, therefore, was correct in overruling the demurrer and declining to dismiss the action.

In the second group of assigned errors are exceptions to evidence tending to show that in 1922 and 1924 Anopheles mosquitoes were found to be breeding in the old bed of the Catawba River and at other places below the dams, and to the exhibition before the jury of a bucket of water dipped during the trial from places below the dams and, according to the plaintiff's evidence, containing Anopheles larvæ. The defendants assert there is no evidence that these places existed as possible sources of breeding in 1919 or that conditions then were similar to those prevailing in 1922 and 1924. But there is evidence for the plaintiff tending to show that the condition of the old river bed was the same in 1922 as in 1919. Apart from this, however, the defendants contended throughout the trial, and repeat in their brief, "that not a single Quadrimaculatus mosquito has ever been found breeding in the defendants' lake or in any other place connected with the defendants' works"; and upon this theory, as already suggested, they based one of their principal defenses. This is shown from the cross-examination of witnesses introduced by the plaintiff prior to the time Fisher was called by the plaintiff for examination. The first witness was Dr. Long, an

admitted medical expert, and on the cross-examination the defendants brought out evidence from which the jury might reasonably have inferred that, in his opinion, neither the dams nor the pools of water in the old channels had provided suitable breeding places for the malaria-bearing mosquito at any time. And so with others. Upon what ground should the plaintiff be denied the privilege of combating this theory before resting his case? It is an established principle that, while one substantive fact is not usually admissible to prove another, still, where an issue is raised as to whether a given effect has been produced or can be produced by alleged causes, evidence apparently collateral is often admitted when the facts present such points of similarity as to afford reasonable data for a conclusion. Jones on Ev., sec. 164. But, without regard to this question, we learn from the record that the defendants in support of their theory offered witnesses admitted to be experts who testified that they had examined the lake for mosquitoes in 1921 and 1922, and that, while mosquitoes bred profusely on the adjacent property, they were not found on the water of the lake. So said their witness, Dr. Carter; and Dr. Le Prince testified upon the trial that there were then no "quads" in the vicinity; from which he deduced the conclusion and expressed the opinion that none were there in 1919. The plaintiff introduced Mason, Hallyburton, and Jaynes in rebuttal. Unquestionably, their testimony was competent, and that of Fisher, even if otherwise inadmissible when offered, was also competent in contradiction of the defendants' witnesses afterward introduced. These assignments, we find, cannot be sustained.

The plaintiff propounded to Dr. Rankin two hypothetical questions which, together with the answers, are made the subject of the defendants' fifth and sixth exceptions. Both questions are based upon an assumed finding of facts, the object of the first being to show the natural and probable effect of the existence of the assumed conditions upon the health of the community, and the object of the second to show whether the prevalence of malaria in the community might have been attributable to these conditions. The defendants urge two objections: (1) That the witness was permitted to express an opinion upon a vital question to be decided by the jury, and (2) that the questions assume the existence of facts which are irrelevant, immaterial, and unsupported by the evidence.

The last objection, it is true, must be considered in the light of decisions holding that it is error to admit a hypothetical question based on an assumed finding of irrelevant or unsupported facts. *S. v. Hall*, 155 N. C., 485; *Bailey v. Winston*, 157 N. C., 252; *Dameron v. Lumber Co.*, 161 N. C., 495; *Brewer v. Ring*, 177 N. C., 476. But we do not admit the defendants' premise that the hypothetical statement is either

irrelevant or unsupported. As to this objection, it will be seen that the questions clearly assume the conditions relied on as existing in the year 1919, when the plaintiff was stricken, as well as in the two years next following; and if these conditions prevailed in 1919, whether or not they continued, would in no wise impair the strength of the plaintiff's contention that they were a potent factor in producing his illness. It was not incumbent on the plaintiff to include in his questions all the evidence bearing upon the fact to be proved; the defendants had the right to present other phases of the evidence in counter-hypothetical questions. *S. v. Stewart,* 156 N. C., 636; *S. v. Holly, supra.* Certain clauses in the questions are pointed out which the defendants insist have no basis in the evidence; but as we read the record there is evidence tending to support each of the clauses thus referred to. Those in the first question are abundantly sustained, and as to the clause in the second question particularly adverted to, it will be observed that the specific question was addressed to the "responsibility or degree of responsibility," if any, of the assigned conditions, and the witness was unable to answer this question. No motion was made to strike out any part of his explanatory remarks that may have been deemed unresponsive. *Hodges v. Wilson,* 165 N. C., 323; *Wacksmuth v. R. R.,* 157 N. C., 34.

The first objection also is without merit. In answer to the first question the witness expressed his opinion upon a matter of science or skill in his profession, not upon the existence or nonexistence of any ordinary circumstances to be determined exclusively by the jury. "There is a rule of evidence which excludes, on the ground of superfluity, testimony which speaks to the jury on matters for which all the materials for judgment are already before the jury. This testimony is excluded simply because, being useless, it involves an unnecessary consumption of time and a cumbersome addition to the mass of testimony. In the majority of instances the testimony thus excluded will consist of an 'opinion' by the witness—*i.e.,* a judgment or inference from other facts, as premises, and it will be excluded because the other facts are already or may be brought sufficiently before the tribunal. If they are not or cannot be, then the witness' judgment or inference will be listened to. Thus, it will often depend on the special qualifications of the witness whether he can add anything valuable which the jury have not already for themselves. When, for example, the size and appearance of a skull-fracture has been testified to, the witness, if he is a person of only ordinary experience, cannot tell any better than the jury can whether the fracture is such as to have necessarily caused death; while, if he is a medical man, he is capable of adding considerably to the jury's information on that point. In the former case, his judgment, or 'opinion,' would be excluded; in the latter case, it would be listened to." Wigmore

on Evidence, sec. 557. It is upon this principle that opinion evidence is admitted, but in admitting it the courts are vigilant to see that the province of the jury shall not be invaded, and to this end exclude, as far as possible, any inference or conclusion as to the ultimate fact in issue. Application of the rule is made in *Nance v. R. R.*, 189 N. C., 638; *Hill v. R. R.*, 186 N. C., 475; *Smith v. Comrs.*, 176 N. C., 466; *Kerner v. R. R.*, 170 N. C., 94; *Mule Co. v. R. R.*, 160 N. C., 253; *Deppe v. R. R.*, 154 N. C., 523. But it is not an inflexible rule, and it is frequently relaxed in the admission of evidence as to ultimate facts in regard to matters of science, art, or skill, as may be seen by reference to *Holder v. Lumber Co.*, 161 N. C., 177; *Ferebee v. R. R.*, 167 N. C., 290; *Barrow v. Ins. Co.*, 169 N. C., 572; *Moore v. Ins. Co.*, 173 N. C., 532, and to many other cases.

The vital question submitted to the jury on this phase of the evidence was embraced in the first issue, but the witness drew no inference from the testimony and merely expressed his professional opinion upon an assumed finding of facts by the jury. *S. v. Bowman,* 78 N. C., 509; *S. v. Cole,* 94 N. C., 958; *Summerlin v. R. R.*, 133 N. C., 554; *Brewer v. Ring, supra; Raulf v. Light Co.*, 176 N. C., 691. We must, therefore, overrule exceptions 5, 6, 8, 9, and 10, which are grouped under assignments 3 and 7.

The defendants called R. V. Michaux as a witness and asked him this question: "Do you know of any cases of malaria up in that country (the Bridgewater section of Burke County) prior to the time the work was started on this dam?" The plaintiff's objection was sustained on the ground that the question did not limit the area inquired of to one mile and a half of the plaintiff's residence. The witness would have answered that he had personal knowledge of such cases. The defendants excepted to the exclusion of the evidence and to a similar ruling of the court in connection with the proposed testimony of other witnesses. These exceptions (15, 16, 17, 18, 20, 23, 24) are classed in assignments 4 and 8.

The defendants say this evidence was admissible as tending to disprove the facts assumed in the hypothetical question put to Dr. Rankin and to impeach the contention that the impounded water had caused the plaintiff's illness. Under ordinary circumstances, the excluded evidence would have been competent (*S. v. Hightower,* 187 N. C., 300), but the question is whether the defendants are in position to take advantage of the exceptions.

After several of his witnesses had testified that malaria had never broken out in the community before the dams were built, the plaintiff offered to prove the condition of the lake, the old channels, and the Linville valley after the water had been impounded. The defendants

objected, and insisted that the evidence should be confined to conditions near the plaintiff's dwelling. This objection and others of similar character were sustained. The plaintiff afterwards called Dr. Houck, an expert witness, and asked him this question: "What would you say as to the prevalence of malaria during the period of your practice in Burke along the Catawba River in the section under consideration? Are you able to state whether malaria was prevalent in these valleys, in these sections, prior to the impounding of the water of Lake James?" The defendants objected unless the question were confined to a distance not exceeding one mile and a half from the place where the plaintiff lived—the distance which, according to all the evidence, is the radius of a mosquito's flight. This objection also was sustained, the plaintiff contending that he, therefore, had to abandon the further examination of the expert on whom he chiefly relied. After the defendants had thus circumscribed the plaintiff's evidence, they excepted because the trial judge refused to relax in their favor and for their benefit the very rule they had invoked against the plaintiff. There is a marked similarity in the questions asked by the respective parties, and if incompetent for the plaintiff, the excluded evidence was likewise incompetent for the defendants. In fact, it is hardly probable that the defendants really hoped to destroy the ruling under which they had sought and secured protection. *Greene v. Ruffin,* 179 N. C., 345. Afterwards, however, they introduced other witnesses who testified that cases of malaria had been known there before the dams were built, and thus received the full benefit of this evidence. In our opinion, they have no just cause of complaint under these conditions.

The proposed testimony on behalf of the defendants that there was an epidemic of malaria in Rutherford County in 1919 and none near a pond on Tom's Creek, four or five miles from Lake James, was properly excluded. (Assignments 5, 6.) In what way it could have thrown any light on the controversy or aided the court or jury is not readily perceptible. It was entirely too remote. There is a fundamental postulate of evidence that circumstances which are irrelevant to the existence or nonexistence of the disputed facts are not admissible. The proposed testimony embodied neither an evidential nor an ultimate fact. *Deming v. Gainey,* 95 N. C., 528; *Southerland v. R. R.,* 106 N. C., 100; *Short v. Yelverton,* 121 N. C., 95; *Geer v. Water Co.,* 127 N. C., 349.

The plaintiff was permitted to prove by Dr. Butt, when recalled, that in June, 1924, he had found Anopheles mosquitoes near the upper end of the defendants' lake and at other places more remote. (Exceptions 78, 91.) This evidence was admitted in rebuttal of Dr. Boldridge, who had previously testified as an expert for the defendants. He had said that in September, 1921, and again a year later he had made an investi-

gation to determine whether mosquitoes would breed on Lake James; that malaria-bearing mosquitoes did not breed there in 1919; that he had come to this conclusion from his examination; that he had looked over the entire area of the lake and had yet to find his first "quad"; that the "punc" would not breed there—the former being a "pond breeder" and the latter a "stream breeder"; that he had examined practically all the streams or branches emptying into the lake and that virtually all seemed to be producing the "punc"; that he had examined the streams below the Catawba dam in the fall of 1922 and 1923, near the plaintiff's house, and, in his opinion, mosquitoes were breeding there in 1919; that he had found pools along the old river bed, but that Anopheles mosquitoes would not breed in foul or scum water, or in water containing iron in soluble form.

For the purpose of contradicting these statements, Dr. Butt was permitted to testify that he had found Anopheles mosquitoes breeding on the still waters of the lake and in the branches and other places; also that the water dipped by another witness from pools in the old river bed contained Anopheles larvæ.

The defendants contend that the evidence should have been restricted to a compass of one mile and a half from the plaintiff's house; but after the judge's ruling on the question, Dr. Boldridge, at the instance of the defendants, testified that his investigation included the entire area of the lake and places outside or beyond it. If the evidence in chief was material for the defendants, was not the evidence in rebuttal material for the plaintiff? So much of it as tended to show the finding of larvæ in June, 1924, was admissible in contradiction of the defendants' evidence that mosquitoes would not propagate where the larvæ were found. We are of opinion that the evidence excepted to was competent in contradiction of the defendants, if not competent in its relevant bearing upon the questions involved in the first issue. *Gaylord v. Respass,* 92 N. C., 554; *Clark v. Guano Co.,* 144 N. C., 64; *Pool v. Anderson,* 150 N. C., 624.

On 17 March, 1919, the plaintiff leased from the Western Carolina Power Company, one of the defendants, for a period ending on the first day of the following December, twenty-five acres of land situated a short distance below the Catawba dam, "solely for agricultural purposes." The lease contained the following agreement: "It is mutually agreed that the lessee shall take the premises subject to the right of the lessor to back or flood the waters of the Catawba and its tributaries upon said land hereby leased, and shall hold the lessor harmless from any and all claims or damages growing out of the backing or ponding of said waters, or the construction, maintenance, or operation of the dam or dams at or near Bridgewater. It is understood and agreed that

the lessor shall have the right to enter and occupy all of said lands or any part of same at any time it may see fit, and that in case of such entry the lessor will pay to the lessee such actual damages as shall be caused to the crops of the lessee by reason of such entry or occupation."

The trial judge instructed the jury as a matter of law that this agreement did not estop the plaintiff from prosecuting his action, and that the answer to the third issue should be "No." The tenth assignment calls in question the accuracy of this instruction. (Exceptions 94, 96.)

The defendants contend that the plaintiff's cause of action is for damages alleged to have been sustained by reason of their negligence in ponding and diverting the water of three streams; that it is, therefore, covered by the terms of the lease which stipulates against any and all claims growing out of the backing or ponding of the waters, and that they contracted with the plaintiff, not against negligence in the performance of a legal duty, but against the initial assumption of any such duty. To sustain this position the appellants cite a number of cases. Several of them simply enunciate the principle that in the absence of express stipulation the landlord is under no obligation to keep the leased premises in repair, but obviously these cases are not decisive of the point raised by the exceptions under consideration. *Fields v. Ogburn,* 178 N. C., 407; *Improvement Co. v. Coley-Bardin,* 156 N. C., 255; *Duffy v. Hartsfield,* 180 N. C., 151; *Hudson v. Silk Co.,* 185 N. C., 342. In the other cases cited it is held in substance that a common carrier while performing its duties to the public cannot contract against its negligence, but if the public has no interest in the contract or in the property affected by it, such contract may not be void as against public policy. *Slocumb v. R. R.,* 165 N. C., 338; *Hartford Ins. Co. v. R. R.,* 175 U. S., 91, 44 Law Ed., 84; *R. R. v. Voight,* 176 U. S., 498, 44 Law Ed., 560; *Robinson v. R. R.,* 237 U. S., 82, 59 Law Ed., 849; *Wells-Fargo & Co. v. Taylor,* 254 U. S., 175, 65 Law Ed., 205. In the first of these cases it appears that Slocumb leased from the railroad a strip of land on which he erected a building for business purposes; that the railroad constructed a siding on the leased premises for Slocumb's use and benefit, and that it was agreed by the parties that any fire originating within the boundaries of the leased property should not be chargeable to the railroad. A spark escaped from a locomotive and started a fire which destroyed the lessee's property. He brought suit and impeached the validity of the stipulation exempting the railroad from liability. In the case of the Hartford Insurance Company the circumstances were similar. In each case the question was whether the contract was against public policy. In the latter it is said: "The authorities all agree that a contract is not void as against public policy unless it is injurious to the interests of the public or contravenes some

established interest of society. . . . The defendant owed no duty to the public to exercise care with respect to its own buildings situate on its right of way and incurred no liability for their negligent burning unless the fire spread beyond its own premises." To the same effect is the decision in Slocumb's case, the Court approving Elliott's statement, "We think that ordinarily a contract exempting a company from liability for negligently burning property not on the right of way or premises of the company would be held void." In Voight's case the question was whether he could avoid his agreement that the railroad company should not be responsible to him for injuries received while occupying an express car as a messenger by invoking the principle of public policy, which forbids a common carrier of passengers for hire to contract against responsibility for negligence; and it was held that he was not a passenger. In *Robinson's case* and in *Taylor's* practically the same principle was upheld.

We have reviewed these cases for the purpose of showing that they are not inconsistent with the instruction given in reference to the third issue. As we understand the lease, it involves neither public policy nor the right to contract; the agreement must be construed as it is written. The land was rented solely for agricultural purposes and the lessor reserved the right to enter and occupy all or a part of it at any time upon paying the lessee the actual damages done the crops by reason of such entry or occupation. The lessee took the land subject to the lessor's right to flood it, and bound himself to pay the stipulated rent, notwithstanding injury to the land by flood or other external cause. *Improvement Co. v. Coley-Bardin, supra.* To forestall the lessor's liability in case it caused damage to the leased premises by flood or otherwise, there was inserted in the agreement a clause exempting it from such liability by releasing all claims and damages growing out of the ponding of the water or the construction, maintenance, or operation of the dams. So, construing the lease in its entirety, we think it manifest that the parties intended merely to provide against the lessor's actual invasion by flood, entry, or otherwise, of the plaintiff's possession or right of possession during the term of his lease, and did not contemplate the lessor's exemption from liability for the creation outside the leased premises of such unsanitary conditions as might result in a nuisance or might seriously impair the plaintiff's health. To adopt the defendants' construction of the agreement, we apprehend, would be equivalent to saying that in the construction of their works the defendants owed no duty to the public; but if 75 or 80 per cent of all the people living in the community suffered in like manner with the plaintiff, as it is claimed, this fact would seem to indicate not only that the public was concerned, but that the agreement (under the decisions in the case of

Slocumb and in that of the Hartford Insurance Company) might give rise to a serious question of public policy.

The plaintiff's action is not based upon an actual invasion of his possession or proprietary rights, creating a liability from which the lessor would be released by the agreement or upon the mere impounding of the water. It is based upon the negligent failure of the defendants to exercise due care with respect to the construction and maintenance of the lake for the protection of the plaintiff in the enjoyment of his legal rights. The stipulated release, therefore, does not bar the present action, as his Honor correctly held, and for this reason the exception to the directed instruction upon the third issue must be overruled.

We find

No error.

MRS. ZENNIE LIDE AND HUSBAND, E. M. LIDE; LUCILLE MARR AND HUSBAND, W. R. MARR; CORNELIA MARLETTE AND HUSBAND, N. H. MARLETTE, AND L. K. MEARS, INDIVIDUALLY, AND WIFE, MARY A. MEARS; THELMA MEARS, MARK MEARS, GERALDINE MEARS, ALTON MEARS, MAMIE MEARS, LINTON MEARS, MINORS, BY THEIR NEXT BEST FRIEND, T. A. CLARK, AND NEIGAL H. MARLETTE, JR., WILEY E. MARR, JR., BY THEIR NEXT BEST FRIEND, T. A. CLARK, PETITIONERS, v. R. M. WELLS, EXECUTOR AND TRUSTEE, AND L. K. MEARS, TRUSTEE OF THE ESTATE OF M. J. MEARS, DECEASED, RESPONDENTS.

(Filed 24 June, 1925.)

1. Wills—Devises—Trusts—Leases—Occupancy—Charges—Intent.

A devise of hotel property to a trustee for the use and benefit of a daughter as long as she shall remain therein and pay certain expenses thereof, giving the trustee the right to terminate her interest in the event of her failure to do so: *Held*, the daughter had the right under the will to lease the premises and receive and enjoy the rental so long as she paid the expenses incident thereto as required by the will.

2. Same—Powers—Estates—Rule in Shelley's Case.

Where the will gives discretionary power to the trustees therein named to sell certain of the testator's lands within a certain period of time, it may only be exercised by them within the stated period, and otherwise subject to certain contingent limitations that the testator has created for his children, grandchildren, etc.; and the word "heirs" used in this will is held to be in the sense of children and not within the meaning of the rule in *Shelley's case.*

3. Same—Executors—Trustees—Intent.

Where in his will the testator gives a certain limited power to his executor to sell certain of the lands, and enlarged power to his trustees named therein, and has by codicil named his son as an additional trustee, the intent of the testator, as gathered from the will, does not affect the restricted power of sale given to the executor.

4. Same—Statutes—Contingent Interests.

Where the testator gives the discretionary power of sale to his trustees of certain of his lands, reserving therefrom a designated vacant lot, the lot so excepted cannot be sold by virtue of the provisions of C. S., 1744, but the Court, in the exercise of its equitable jurisdiction, may order a sale, and the purchaser, upon complying with his bid, will get a good title.

APPEAL by defendants from judgment by *Finley, J.*, Twentieth Judicial District, at chambers in Sylva, 11 March, 1925. From HAYWOOD.

Petitioners, as legatees, devisees, and beneficiaries named in the last will and testament of M. J. Mears, deceased, have brought this action against the defendants, trustees named in said will, praying a judgment and decree construing said will and determining the interests of the petitioners thereunder. They further pray that the court decree that the trust estate created by the provisions of the said will be declared at an end and that defendants be discharged as trustees under said will; that an offer made in writing by W. J. Hampton of $8,000 for the vacant lot described in the will be accepted and that an order be made for the conveyance of said lot to said Hampton upon payment of said sum, and that a sufficient amount at least of the vacant lot described as part of the hotel property be sold to raise funds with which to pay off and discharge certain street assessments levied by the town of Canton against said property, and that the remainder of said fund, together with the money derived from the sale of the vacant lot, be invested under the orders of the court.

Defendants, as trustees, filed an answer in which they aver that their only interest in the matters set forth in the petition arises from their desire to perform their duties as such trustees, and pray the court to advise them as to their powers and duties under the will of their testator.

Upon the hearing the court found the facts and rendered judgment and decree thereon. Respondents excepted to the judgment and appealed to the Supreme Court. Assignments of error are stated and discussed in the opinion below.

Smathers & Robinson and A. L. Clark for petitioners.
Clarence Blackstone and Eugene Taylor for respondents.
T. A. Clark for minor petitioners.

CONNOR, J. M. J. Mears died in Haywood County on 8 December, 1920. A paper-writing, copy of which is attached to the petition, was duly probated as his last will and testament and recorded in the office of the clerk of the Superior Court of Haywood County.

The first item of said will is as follows: "It is my will and desire that all my real and personal property which I may own at my death shall be held and disposed of by my trustee hereinafter named and in the manner hereinafter set out." In the next item he constitutes and appoints "my trusted friend, R. M. Wells, of the city of Asheville, N. C., trustee, to hold and control and to do everything necessary in and about certain of my real estate hereinafter described for a term of fifteen years from the date of my death, for the use and benefit of my son, Lawrence K. Mears, and my daughter, Mrs. Zennie Lide, and their children or grandchildren, in the event of their death as hereinafter more fully set forth." This will is dated 25 May, 1917. In a codicil dated 25 September, 1919, he appoints his "beloved son, Lawrence K. Mears, as one of my trustees, to aid my other trustee named in the will in the management of the property in said will bequeathed and devised."

Specific reference is made in the will to certain lots of land situate in the town of Canton; specific directions are given to the trustees as to these lots. Item VIII is in the following words: "That my said trustees from any and all moneys derived from the sale of my property belonging to me at the time of my death are authorized and directed to invest the same in North Carolina bonds or United States bonds, at the best rate of interest possible, and the net proceeds arising from said bonds (in way of interest) shall be disposed of and distributed in the manner set out in paragraph three hereof." In item III testator directs that the net proceeds of all sums collected as rent for his lots be divided equally between his son and daughter and paid by the trustee to them, as directed therein. Item XI is as follows: "That this trust shall remain in force and effect for sixty (changed to twenty by the codicil) years from the date of my death, at which time my said estate shall be equally divided between the heirs of my children, and they shall receive all of my property, both real, personal, and mixed, *per stirpes.*"

The first paragraph of the judgment signed by Judge Finley is as follows:

"That a trust estate in all the property, both real and personal, of the testator, except such property as was mentioned in paragraph V of said last will and testament, was created by the last will and testament of M. J. Mears, deceased, and that R. M. Wells and L. K. Mears were appointed trustees of said estate by the terms of said last will and testament for a term of fifteen years."

Defendants except for that his Honor should have adjudged that said trust estate was created for a period of twenty years, as appears from item XI, as modified by the codicil, paragraph III. Appellants' first

assignment of error is based upon this exception. It is conceded by plaintiffs that this assignment of error should be sustained. By the express provisions of said item XI, the trust shall continue for and expire at the end of twenty years. The judgment should be modified in accordance with this holding.

By item VII of his will the testator authorizes and directs his trustees to lease to his daughter, Mrs. Zennie Lide, the "hotel in which he lived at the date of the execution of the will, together with the grounds or lands adjacent thereto, so long as the same remains unsold by said trustees, for which no charges shall be made to my said daughter, except that she shall from time to time keep the said building and grounds on which said hotel is situate in good repair, pay the taxes and assessments on the same, and pay the fire insurance premiums and all other necessary expenses to keep said building and lot in as good repair as it is at present." "In event my said daughter shall fail to make said repairs, etc., above set out, then my trustees are ordered and directed, in their discretion, to terminate said lease and rent said hotel and grounds at the best rental, and the proceeds derived therefrom to be divided as hereinafter set out in paragraph 8 of this will." The above provisions of this item are changed by paragraph 4 of the codicil to the extent that the said daughter is relieved of payment of assessments, and required to pay only taxes, premiums for insurance, and repairs; it is therein further provided that in the event she does not wish to occupy said hotel and grounds, the trustees are authorized to lease the same, in accordance with the provisions of said codicil.

Paragraph 3 of the judgment is as follows: "It is further adjudged by the court that Mrs. Zennie Lide had a right to use and occupy the said hotel without paying rent and upon condition that she pay the taxes, insurance and repairs upon the building, and that she preserve and maintain the hotel property; and it appearing to the court that Mrs. Zennie Lide, with the acquiescence of the trustees, has temporarily moved away from the hotel and placed the management of the same in other hands, it is, therefore, ordered and adjudged that Mrs. Zennie Lide has not forfeited her right to use and occupy the hotel property by permitting the same to be occupied by others, and that she may hereafter, with the permission of the trustees, continue to allow others to occupy said hotel property and receive the rents therefrom, from which rents and other sources she shall keep the said property in repair and pay the taxes and insurance on said property."

Defendants except to this paragraph of the judgment, contending that under the will Mrs. Lide forfeited all interest in the hotel property when she ceased to occupy the same in person, and that thereafter the

trustees were entitled to the rents from the same, to be distributed as income from other property in their hands. The second assignment of error is based upon this exception.

This contention is not sustained by *Manning v. Woff,* 22 N. C., 11. In that case provision was made by the testator for his widow and his children while the children remained "at home." It was held that plaintiff, having left home to live with a married sister, was not entitled to an allowance from the estate for her support. The purpose of the testator was to enable his widow to maintain a "household." No such purpose on the part of the testator in this case is to be gathered from his will. It was his purpose that his daughter should enjoy the use and benefits accruing from the hotel property so long as she found that same was sufficient to compensate her for the burdens imposed upon her with respect to said property. The testator must have contemplated that she might desire to use this property for the purpose for which it was designed—to wit, a hotel—and it could make no difference that she leased it rather than operate it herself. It cannot be held that personal occupancy of the property upon the facts in this case was a condition upon which her rights therein under the will were dependent. *Johnson v. Gooch,* 116 N. C., 65, is, therefore, not applicable. See Black's Law Dictionary, word "occupancy" and note.

So long as Mrs. Lide is content to bear the burdens imposed upon her with respect to said hotel property, she is entitled to the use and benefit of the same, whether she occupy the buildings and land adjacent thereto in person or by another. This right is subject, however, to such power as the trustees have under the will, or such power as a court of competent jurisdiction has to sell the property. The assignment of error is not sustained.

In the event that she shall forfeit her rights to occupy said hotel property by failure to pay taxes, insurance, or repairs, or in the event she shall no longer wish to occupy the same, then the trustees are empowered to lease the same upon the conditions set out in the will and codicil. The power to lease does not affect such power to sell as the trustees have under the will. Mrs. Lide's right to occupy the property is not dependent upon the acquiescence of the trustees, so long as she complies with all the conditions upon which such rights are made to depend, and the trustees do not, in their discretion, exercise such powers to sell as they have under the will. This seems to be the clear purpose of the testator.

By their third, fourth, and fifth assignments of error, based upon exceptions to the judgment, the trustees present to this Court the questions as to their power under the will to sell and the power of the

Superior Court to order the sale of the lands or any part of the same now constituting a part of the estate of the testator and in their hands and subject to their control.

These lands are (1) the hotel property, being the lot on which the hotel is located and some five or six acres of land adjacent thereto; (2) the vacant lot on Main Street, and (3) the two lots on which are located the brick store buildings described in the will as "part of what is known as my hotel property," all situate near the center of the town of Canton, N. C.

The powers of the trustees with respect to these lots are those conferred by the will and the codicil thereto, by which certain provisions of the will are changed or altered. The power to sell each of these lots is expressly given to the trustees, but subject to certain limitations as to the time within which the power must be exercised with respect to certain of the lots. They have no power to sell, except that conferred by or derived from the will, and the limitations upon this power imposed by the testator in his will must be observed by the trustees. *Thompson v. Power Co.*, 154 N. C., 13, and authorities cited in the opinion of *Justice Manning*.

The trustees are authorized by item II of the will "to hold and control and to do everything necessary in and about" said property for a term of fifteen years. Under item III of the will, as changed by paragraph 1 of the codicil, they are directed expressly to take charge of and control over the two brick store lots, and are authorized to sell same "on or before ten years after my death." The provision in the will that they should not be sold by the heirs or trustees "for a term of fifteen years" is changed by the codicil, which authorizes a sale by the trustees of the "store building mentioned in paragraph 3 of my said will in or before ten years after my death." The trustees have, therefore, the present power to sell in their discretion the lots on which are located the two brick store buildings, the proceeds of such sale as may be made to be invested and the income therefrom to be distributed in accordance with the provisions of the will and codicil.

By item III the testator directs that the vacant lot shall not be sold, conveyed, or disposed of by his heirs or trustees for a term of fifteen years from the date of his death. The codicil makes no change in item III with respect to this lot. We cannot approve the finding that this lot was inadvertently omitted from paragraph 1 of the codicil. The trustees, therefore, have no present power to sell the vacant lot.

By item VI the trustees are authorized to sell the hotel property, except such portion thereof as is mentioned in item III (*i.e.*, the lots on which the brick stores are located, which they were subsequently authorized by the codicil to sell), to any purchaser or purchasers at

such time as in the discretion of the trustees may seem right and proper. By paragraph 4 of the codicil it is provided that "my *executor* may sell the same (*i.e.*, the said hotel property) within two years after my death." While the executor and one of the trustees is the same person, this provision in the codicil cannot be held to change or alter the provision in the will by which the trustees are given power to sell said property. The trustee is named in item II and the executor in item XII of the will. In the codicil the testator appoints his son as one of the trustees to aid the trustee named in the will in the management of the property. He is not appointed as an executor. The testator evidently had in mind the clear distinction between the powers and duties which he was conferring and imposing upon his trustees and those to be exercised and performed by his executor. The executor might have sold the hotel property within two years after the death of the testator; the trustees may now sell the said property at any time in their discretion and invest the proceeds as directed by the testator in his will.

We, therefore, hold that the trustees now have the power to sell and convey, in their discretion, both the lots on which the store buildings are located and the hotel property. This power is expressly conferred by the testator upon them, one of whom he refers to as his "trusted friend" and the other as his "beloved son." There is no finding and no suggestion that the trustees have acted or are acting in bad faith in not selling said property. Without such finding, the court has no jurisdiction to order a sale or to control the trustees with respect to the exercise of the powers conferred upon them by the testator. *Baker v. McAden,* 118 N. C., 741; *Hinton v. Hinton,* 68 N. C., 99.

The trustees have no present power to sell the vacant lot. Under the will, neither they nor the heirs of the testator can sell this lot until the expiration of fifteen years from the death of the testator. At the expiration of twenty years the trust estate, which includes this lot, shall terminate, and this lot as part of said estate will be included in the division between the "heirs" of the children of the testator, who will take *per stirpes.*

Has the Superior Court the power to order a sale of this vacant lot upon the facts found by the court and the investment of the proceeds of the sale in accordance with the provisions of item VIII of the will?

This proceeding in which the order for the sale of the said lot has been made was not instituted and has not been conducted in accordance with C. S., 1744. The power of sale has not been exercised by virtue of the statute. The proceeding was brought before the clerk, and not in term. The minors are not represented by guardians *ad litem* appointed by the judge, but by a next friend appointed by the clerk. The order of sale was signed, not during the term of the Superior Court

in Haywood County, but by the judge holding the courts of the Twentieth District (which includes Haywood County) at Sylva, in Jackson County, in said district. The order of sale cannot, therefore, be held valid, because made under the power conferred upon the Superior Court.

By his will the testator devised the vacant lot to the trustees for twenty years from the date of his death, and at the expiration of such term to the "heirs of his children, to be equally divided between them *per stirpes.*" The testator left surviving two children, a son and a daughter, both of whom had children living at the date of testator's death. The son and daughter are now living. Under C. S., 1739, the word "heirs," used in item XI of the will, must be construed to mean "children." *Graves v. Barrett,* 126 N. C., 267; *Campbell v. Everhart,* 139 N. C., 503. The children of the son and daughter of the testator living at his death, therefore, have an interest or estate in said vacant lot which vested at death of testator, the enjoyment only of which was postponed until the expiration of twenty years. Whether a child or children of the son or daughter born after the death of the testator, or a child or children of a child living at death of testator, but who may die before expiration of twenty years, such after-born child or children, or such child or children of a deceased child living at termination of the trust estate, will share with children of the son or daughter living at death of testator need not now be determined. If so, they will each share in the division as a member of a class represented by parties to this proceeding and will be bound by orders, judgment, and decrees made herein. *Springs v. Scott,* 132 N. C., 548, and cases cited in Anno. Ed.; *Trust Co. v. Nicholson,* 162 N. C., 258, and cases cited in Anno. Ed.

We, therefore, conclude that the Superior Court has the power to order a sale of the vacant lot and the conveyance of same to the purchaser upon payment of the purchase price approved by the court. Upon the facts found by the court as set out in the judgment, the exercise of this power with respect to the vacant lot is approved. The purchase price, less such costs and expenses as may be authorized and approved by the court, should be invested as directed by the testator in item VIII of the will.

The third and fourth assignments of error are sustained. The fifth assignment of error, based upon exception to paragraph 9 of the judgment and decree, is not sustained. The judgment, in accordance with this opinion, is

Modified and affirmed.

THOMAS G. HARDIE & CO. v. WESTERN UNION TELEGRAPH COMPANY.

(Filed 24 June, 1925.)

1. Telegraphs—Commerce—Cipher and Obscure Messages—Federal Control—Statutes.

The regulation as to interstate telegraphic messages has been taken over by an act of Congress and made uniform in certain classifications by the Interstate Commerce Commission, including obscurely worded or written messages, or messages written in cipher, and the decisions of the Supreme Court of the United States as to the measure of liability of a telegraph company in interstate commerce are controlling in the State courts.

2. Same—Contracts—Torts—Valid Stipulations.

A telegraphic message written obscurely in cipher is not presumed to be understood by the telegraph company accepting it for transmission and delivery, and under the Federal decisions, upon a message of this character in interstate commerce, there can be no recovery of actual damages when the character or meaning of its contents are not disclosed to the telegraph company handling the same, whether the action be regarded as in contract or tort, as such damages will not be presumed upon the face of the message to have been in contemplation of the parties when the transaction was entered into by them.

3. Same—Parties—Sender of Message.

Both the sender and sendee of a telegraphic message are bound by the valid stipulations on an interstate telegram, and the latter may not recover upon a mistake made in the transmission of an obscure or cipher message when the sender may not do so under the Federal decisions and statutes.

APPEAL by defendant from *Stack, J.*, at March Term, 1924, of MECKLENBURG.

Civil action to recover damages for an alleged negligent error in the transmission of the following telegram:

"Terrell, Texas, 1-18-23.

"Thos. G. Hardie & Co., Charlotte, N. C.

"Rivulet offer blurting concern inch group B bluffness on March.

"Ludlam, McGinty & Company."

Translated, this message means: "Your telegram received. Offer 500 middling inch group B 125 on March."

The word "bluffness," meaning 125, was changed in transmission to "bluffing," which has a code meaning of 100.

Upon the strength of this telegram, plaintiff sold to the Monarch Mills, of Union, S. C., 500 bales middling inch cotton at 100 on March, and alleges that it sustained a loss of $663 by reason of the error aforesaid.

This message was written on one of the defendant's regular forms, and contained, *inter alia,* the following stipulations:

1. "To guard against mistakes or delays, the sender of a message should order it repeated—that is, telegraphed back to the originating office for comparison. For this, one-half the unrepeated-message rate is charged in addition."

2. "The company shall not be liable for mistakes or delays in the transmission or delivery, or for nondelivery, of any message received for transmission at the unrepeated-message rate beyond the sum of five hundred dollars . . . nor in any case for delays arising from unavoidable interruption in the working of its lines, nor for errors in cipher or obscure messages."

3. "No employee of the company is authorized to vary the foregoing."

These stipulations were on file with and approved by the Interstate Commerce Commission prior to and at the time of sending the above message.

Upon denial of liability and issues joined, the jury returned a verdict in favor of plaintiff for $500, it being admitted that the message in question was an unrepeated message. The court ruled that the first part of stipulation No. 2 above was valid and the second clause, in regard to cipher or obscure messages, void.

From the judgment rendered thereon, defendant appeals, assigning errors.

T. L. Kirkpatrick and H. L. Taylor for plaintiff.
Tillett & Guthrie for defendant.

STACY, C. J. The telegram in question was sent from Terrell, Texas, to the plaintiff at Charlotte, N. C. It is, therefore, a transaction in interstate commerce, and the case is to be decided under the act of Congress, 18 June, 1910, 36 Stat. at L., 539, the pertinent provisions of which are as follows:

"All charges made for any service rendered or to be rendered in the transportation of passengers or property and for the transmission of messages by telegraph, telephone, or cable, as aforesaid, or in connection therewith, shall be just and reasonable; and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful: *Provided,* that messages by telegraph, telephone, or cable, subject to the provisions of this act, may be classified into day, night, repeated, unrepeated, letter, commercial, press, government, and such other classes as are just and reasonable, and different rates may be charged for the different classes of messages," etc.

The case is governed by the Federal law. *Postal Tel.-Cable Co. v. Warren-Godwin Co.*, 251 U. S., 27; *Johnson v. Tel. Co.*, 175 N. C., 588; *Bateman v. Tel. Co.*, 174 N. C., 97; *Norris v. Tel. Co.*, 174 N. C., 92; *Meadows v. Tel. Co.*, 173 N. C., 240. As said in *Gardner v. W. U. Tel. Co.*, 231 Fed., 405: "Congress has taken possession of the field of interstate commerce by telegraph, and it results that the power of the State to legislate with reference thereto has been suspended."

Prior to the passage of this act by Congress, many States, including North Carolina, had held that the stipulation limiting the defendant's liability to the cost of the telegram in case of an unrepeated message was one restricting its liability for negligence and, therefore, void, as against public policy. *Young v. Tel. Co.*, 168 N. C., 36; *Rhyne v. Tel. Co.*, 164 N. C., 394; *Williamson v. Tel. Co.*, 151 N. C., 223; *Hendricks v. Tel. Co.*, 126 N. C., 304; *Sherrill v. Tel. Co.*, 116 N. C., 655; *Brown v. Tel. Co.*, 111 N. C., 187, overruling *Lassiter v. Tel. Co.*, 89 N. C., 334; 37 Cyc., 1684.

But since Congress has taken possession of the entire field of commerce, with respect to telegraphs, telephones, and cables of an interstate character, and of messages transmitted from one State to another through the medium of the electric telegraph, we have abandoned our own decisions and followed those of the Supreme Court of the United States, having, as it does, the final authority to interpret and declare the law on the subject. *Meadows v. Tel. Co.*, 173 N. C., 240; *Boone v. Tel. Co.*, 175 N. C., 718; *Askew v. Tel. Co.*, 174 N. C., 261; *Bateman v. Tel. Co., supra; Norris v. Tel. Co., supra; Byers v. Express Co.*, 240 U. S., 612, reversing the same case, 165 N. C., 542.

In *Primrose v. W. U. Tel. Co.*, 154 U. S., 1, the Federal Supreme Court passed upon the validity of a contract made by a telegraph company with the sender of an interstate message by which, in case the message were missent, the liability of the company was limited to a refunding of the price paid for sending it, unless, as a means of guarding against mistake, the repeating of the message for comparison from the office to which it was directed to the office of origin was secured by the payment of an additional sum. It was held that such a contract was not one exempting the company from liability for its negligence, but a reasonable condition appropriately adjusting the charge for the service rendered to the duty and responsibility exacted for its performance. Such a stipulation was, therefore, held to be valid, and the right to recover for error in transmitting a message sent subject to it was accordingly limited to the price paid for sending the telegram. *Postal Tel.-Cable Co. v. Warren-Godwin Co.*, 251 U. S., 27. *Arguendo,* the Court said: "By the regulation now in question, the telegraph company has not undertaken to wholly exempt itself from liability for negligence,

but only to require the sender of the message to have it repeated, and to pay half as much again as the usual price, in order to hold the company liable for mistakes or delay in transmitting or delivering, or for not delivering a message, whether happening by negligence of its servants or otherwise." Likewise, the validity of stipulations limiting liability in case of loss of goods resulting from the default of an interstate carrier has been sustained in a number of decisions. *Adams Ex. Co. v. Croninger,* 226 U. S., 491; *Ch. B. and D. R. Co. v. Miller,* 226 U. S., 517; *Ch. St. Paul M. & O. R. Co. v. Latta,* 226 U. S., 519; *Mo. K. and T. R. Co. v. Harriman,* 227 U. S., 657; *S. A. L. R. Co. v. Pace Mule Co.,* 234 U. S., 751, reversing same case, 160 N. C., 215; *W. U. Tel. Co. v. Dant,* 42 App. D. C., 398; L. R. A., 1915B, 685; Ann. Cas., 1916A, 1132, and note.

It has been held with us that the sendee or receiver of a telegraphic message, as well as the sender, is bound by the valid stipulations of the contract, such as the one prescribing the time for bringing suit for damages and other similar provisions, whether the action is brought in contract or in tort. *Lytle v. Tel. Co.,* 165 N. C., 504; *Penn v. Tel. Co.,* 159 N. C., 306; *Barnes v. Tel. Co.,* 156 N. C., 150; *Forney v. Tel. Co.,* 152 N. C., 494; *Sykes v. Tel. Co.,* 150 N. C., 431; *Lewis v. Tel. Co.,* 117 N. C., 436; *Sherrill v. Tel. Co.,* 109 N. C., 527; *Meadows v. Tel. Co., supra; Norris v. Tel. Co., supra.* Speaking to the question in *Penn v. Tel. Co.,* 159 N. C., p. 314, *Hoke, J.,* said: "These regulations, to the extent that they are reasonable and not in excuse for negligence, have been upheld with us by express decision, and we see no reason why they should not be allowed to prevail, whether the action is in contract or tort. (Citing authorities.) We are aware that there are decisions to the contrary in other jurisdictions, more especially in respect to the addressee of the message, but they are not in accord with the principles established here." See, also, 26 R. C. L., 583.

Thus, in conformity with our own decisions and many others, until the Supreme Court of the United States shall decide otherwise, we are constrained to hold that the valid stipulations relating to interstate messages, and which enter into and form a part of the contract, are binding on both the sender and the sendee.

This, then, brings us to the crucial question as to whether the stipulation exempting the defendant from liability "for errors in cipher or obscure messages" is valid or void. The stipulation has been approved by the Interstate Commerce Commission and it is controlled by the Federal law. *W. U. Tel. Co. v. Czizek,* 264 U. S., 281. Speaking to the subject in *W. U. Tel. Co. v. Esteve Bros. & Co.,* 256 U. S., 566, *Mr. Justice Brandeis,* for the Court, said:

"The lawful rate having been established, the company was by the provisions of sec. 3 of the 'Act to Regulate Commerce' prohibited from granting to any one an undue preference or advantage over the public generally. For, as stated in *Postal Tel.-Cable Co. v. Warren-Godwin Lumber Co., supra,* 30, the 'act of 1910 was designed to, and did, subject such companies as to their interstate business to the rule of equity and uniformity of rates.' If the general public, upon paying the rate for an unrepeated message, accepted substantially the risk of error involved in transmitting the message, the company could not, without granting an undue preference or advantage, extend different treatment to the plaintiffs here. The limitation of liability was an inherent part of the rate. The company could no more depart from it than it could depart from the amount charged for the service rendered.

"The act of 1910 introduced a new principle into the legal relations of the telegraph companies with their patrons which dominated and modified the principles previously governing them. Before the act the companies had a common-law liability from which they might or might not extricate themselves, according to views of policy prevailing in the several States. Thereafter, for all messages sent in interstate or foreign commerce, the outstanding consideration became that of uniformity and equality of rates. Uniformity demanded that the rate represent the whole duty and the whole liability of the company. It could not be varied by agreement; still less could it be varied by lack of agreement. The rate became, not as before, a matter of contract by which a legal liability could be modified, but a matter of law by which a uniform liability was imposed. Assent to the terms of the rate was rendered immaterial, because when the rate is used, dissent is without effect."

If it were an open question we should be disposed to uphold the stipulation in so far as it is in affirmance of the principles announced in *Hadley v. Baxendale,* 9 Exch., 345 (*Cannon v. Tel. Co.,* 100 N. C., 300; *Kennon v. Tel. Co.,* 126 N. C., 232; *Newsome v. Tel. Co.,* 153 N. C., 153; *S. c.,* 144 N. C., 178), and declare it invalid to the extent that it may be in conflict therewith, or to the extent that it may undertake to exempt the defendant from all liability for its negligence. 26 R. C. L., 603. But in *Primrose v. W. U. Tel. Co.,* 154 U. S., 1, the validity of this stipulation has been upheld as against the sender of the message, and it is the ruling with us, as above indicated, that the valid stipulations of such contracts are alike binding on the sender and the sendee. See 26 R. C. L., 576.

Speaking directly to the question, *Mr. Justice Gray,* for the Court, said:

"It is also to be remembered that, by the third condition or restriction in the printed terms forming part of the contract between these

parties, it is stipulated that the company shall not be 'liable in any case' 'for errors in cipher or obscure messages'; and that it is further stipulated that 'no employee of the company is authorized to vary the foregoing,' which evidently includes this, as well as other restrictions.

"It is difficult to see anything unreasonable or against public policy in a stipulation that if the handwriting of a message delivered to the company for transmission is obscure, so as to be read with difficulty, or is in cipher, so that the reader has not the usual assistance of the context in ascertaining particular words, the company will not be responsible for its miscarriage, and that none of its agents shall, by attempting to transmit such a message, make the company responsible. . . .

"But it certainly was a cipher message, and to hold that the acceptance by the defendant's operator at Philadelphia made the company liable for errors in its transmission would not only disregard the express stipulation that no employee of the company could vary the conditions of the contract, but would wholly nullify the condition as to cipher messages, for the fact that any message is written in cipher must be apparent to every reader.

"Beyond this, under any contract to transmit a message by telegraph, as under any other contract, the damages for a breach must be limited to those which may be fairly considered as arising according to the usual course of things from the breach of the very contract in question, or which both parties must reasonably have understood and contemplated when making the contract as likely to result from its breach. This was directly adjudged in *W. U. Tel. Co. v. Hall,* 124 U. S., 444.

"In *Hadley v. Baxendale,* 9 Exch., 345, decided in 1854, ever since considered a leading case on both sides of the Atlantic, and approved and followed by this Court in *W. U. Tel. Co. v. Hall,* above cited, and in *Howard v. Stillwell Co.,* 139 U. S., 199, 206, 207, *Baron Alderson* laid down as the principles by which the jury ought to be guided in estimating the damages arising out of any breach of contract the following: 'Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally—*i.e.,* according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from

the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract.' 9 Exch., 354, 355."

We may also add that the principles announced in *Hadley v. Baxendale* have been firmly established in our own jurisprudence. *Johnson v. R. R.*, 184 N. C., 101; *Fertilizer Works v. Simpson*, 183 N. C., 251; *Furniture Co. v. Express Co.*, 148 N. C., 87; *Williams v. Tel. Co.*, 136 N. C., 82.

Again, to secure a reduction in telegraphic tolls, and not secrecy, is quite often the real inducement for sending cipher messages, especially as the companies are prohibited, in many States by statute, from disclosing the contents of any message entrusted to their care. C. S., 4497, *et seq.* This, in effect, is to obtain a cheaper rate on a given message, and at the same time to render it more difficult for the defendant to perform the service. It is provided in the act of Congress that interstate messages sent by telegraph, telephone, or cable may be divided into such classes as are just and reasonable, and different rates established for the different classes. Cipher messages have been placed in the nonliability class, so far as errors in transmission are concerned, and this has been approved. *Postal Tel.-Cable Co. v. Warren-Godwin Co.*, 251 U. S., 27.

The present action is by the sendee or receiver of an interstate cipher message, intelligible only to the sender and the plaintiff to whom it was addressed, to recover damages for an error in the transmission of said message, and there is nothing on the record to disclose its value or to put the defendant on notice of its worth to the parties, nor is there any evidence of willful misconduct or gross negligence on the part of the defendant. *W. U. Tel. Co. v. Esteve Bros. & Co., supra; Primrose v. Tel. Co., supra; Jones v. Tel. Co.*, 18 Fed., 717; *White v. Tel. Co.*, 5 McCrary, 103; 26 R. C. L., 574; Jones on Tel. & Tel. Companies (2 ed.), sec. 407. It follows, therefore, from what is said above, that the plaintiff is not entitled to recover, and the defendant's motion for judgment as of nonsuit should have been allowed.

Reversed.

T. C. YOUNG v. THE BOARD OF COMMISSIONERS OF JOHNSTON COUNTY, THE STATE HIGHWAY COMMISSION, AND FRANK PAGE.

(Filed 24 June, 1925.)

Counties—State Highway Commission — Statutes — Loans—Contracts—Consideration—Questions of Law.

In contemplation of the statute, the State Highway Commission is entrusted to construct and maintain a system of public highways and to contract in reference thereto, and a contract made between this board and the board of commissioners of a county wherein the latter is to advance certain moneys as a proportionate expense in the former's taking over and maintaining a particular highway to be repaid by the State Highway Commission from its funds is a valid and legal contract, supported by a sufficient consideration.

APPEAL by defendant from order of *Daniels, J.*, 2 June, 1925, of WAKE.

The defendants appealed from an order of *Daniels, J.*, enjoining them from carrying into effect a contract executed on 14 April, 1925, by and between the county commissioners and the highway commission. By the terms of this contract, the commissioners of Johnston County, in consideration of securing the construction of Route 22 (a part of the highway system extending through the county from the Wilson to the Harnett line), earlier than it would be possible to have it built without an advancement of funds by the county, agreed to lend the highway commission $500,000 to be used as a part of the money necessary for the construction of the road, and to have this amount available and subject to draft as soon as the highway commission should indicate its readiness to let out the work. The highway commission thereby obligated itself to proceed as rapidly as practicable with the preparation of the plans and specifications for concrete pavement and to do the work as rapidly as practicable, supplementing the sum advanced by the county with the funds of the highway commission, and, further, to repay to Johnston County, without interest, out of the funds allocated to the county from the proceeds of bond issues thereafter authorized by the Legislature, or out of other road construction funds, to the extent that such funds might be sufficient therefor, the net sum of $500,000, or so much thereof as might be advanced by the county to the highway commission.

On 30 May, 1925, the plaintiff brought suit, and in his complaint, after setting out the contract, alleged that the county commissioners were preparing to sell notes or bonds of the county in the sum of

$500,000 with a view to turning the amount over to the highway commission; that the highway commission had surveyed the route, was preparing plans and specifications, and intended to begin work on the road; that the obligation assumed by the highway commission was in excess of the funds appropriated by the Legislature and would require for its payment the amount which the county had offered to lend, and that the chairman of the highway commission was undertaking to accept the loan and had issued directions to the commission's clerical force to credit the county and to apply in repayment whatever funds should be subsequently allocated to the county for the construction of its roads. The plaintiff further alleged that the contract is void and prayed that the parties be restrained.

The commissioners and the highway commission filed separate answers admitting the material allegations in reference to the contract, but denying that it is void. The defendant Page filed an affidavit to the effect that the contract had been made pursuant to a policy adopted by the commission soon after its organization in 1921; that advances approximating a total of ten million dollars had been accepted from the various counties of the State to hasten the building of links in the highway system, and the commission had promised to reimburse the counties out of funds thereafter available for the purpose; that some of the counties had been reimbursed in part, some in full, and that a large number of similar contracts were then outstanding. He further stated that the county commissioners had been informed that the highway commission had no authority to pledge the faith and credit of the State to the repayment of these advances beyond the extent of funds already appropriated, and that the promise to reimburse the counties had been conditioned upon future allocations; that the amount which Johnston County had agreed to advance, together with available State funds, would be sufficient to complete the proposed road, and that without an additional issue of bonds an annual construction fund of $60,000 would go to Johnston County.

At the hearing Judge Daniels, being of opinion that the contract in question had been executed without authority of law and was *ultra vires,* restrained and enjoined the defendants from proceeding further in carrying said contract into effect. The defendants excepted and appealed.

A. M. Noble for plaintiff.

James D. Parker for Johnston County.

Charles Ross for State Highway Commission.

Attorney-General Brummitt and Assistant Attorney-General Nash for State.

ADAMS, J. The exception raises the question whether the instrument purporting to be a contract between the county of Johnston and the State Highway Commission was *ultra vires,* or entered into without authority of law; and the answer to this question involves the alleged legal right of the county to make the proposed loan and of the commission to obligate itself to the repayment thereof as the contract provides.

The act creating the existing highway commission and making provision for a State system of dependable roads went into effect on 3 March, 1921, authorizing the continuance of the former commission, however, until the commission thereby created should be formally organized. Public Laws 1921, ch. 2; Public Laws 1919, ch. 189. Soon thereafter the provisions of section 14 were sustained on appeal from a judgment rendered in the Superior Court of Harnett County. In that case it was alleged that on 20 May, 1921, the board of commissioners had entered into a contract with the State Highway Commission, in accordance with section 14, for the advancement of funds to construct a part of the highway system through the county. This Court, upholding the contract, said in substance that a county primarily is required to construct and maintain its roads and bridges, and that as the board of commissioners was specially authorized by section 14 to contract with the highway commission in reference to the construction of the road, it was the duty of the board, so far as it was legally empowered, to provide the funds necessary for such purpose. *R. R. v. McArtan,* 185 N. C., 201.

In *Lassiter v. Comrs.,* 188 N. C., 379, the act of 1921, ch. 2, was presented in another phase. There it appeared that as between two routes proposed for a part of the State highway system extending from Raleigh to Wendell, the State Highway Commission had adopted the Milburnie, or upper road, on condition that the board of commissioners of Wake County should contribute the sum of $41,500 as a proper liability and as a proportion of the cost of construction and repair to be borne by the county. It was objected that without a vote of the people the commissioners had no legal right to make the contribution, but the Court held otherwise, *Chief Justice Hoke* saying: "So all-pervading and insistent is the power of county commissioners on the question of public roads that, although special legislation may disclose a purpose to supervise and control the matter of roads by other boards, as the township system, unless clearly forbidden by such legislation, the county commissioners could lend proper aid to this effort by appropriating general county moneys for the purpose. *Bunch v. Comrs.,* 159 N. C., p. 335. And it has also been uniformly held that in the exercise of these powers the construction and repair of the public roads

are a necessary expense not requiring the approval of a popular vote. *Woodall v. Highway Commission,* 176 N. C., 377; *Davis v. Lenoir,* 178 N. C., 668; *Hargrave v. Comrs.,* 168 N. C., 626; *Murphy v. Webb,* 156 N. C., 402. It is urged against the exercise of such power in the present instance that when the Milburnie Road is taken over by the highway commission, such commission is given full control, and it is then no longer a county road; but, as shown in the evidence, this was a public road, a part of the county system, and for the repair and upkeep of which the county was liable. Unless and until it is taken over by the State commission it constitutes a county charge. And we see no reason why, in the exercise of their power concerning it, the county commissioners may not provide by contract a way for the continued and reliable upkeep by the State commission, and thus relieve the county of the incidental burdens. True, we would be slow to hold that county commissioners could make an arrangement with some non-official board by which they would undertake to absolve themselves from their governmental duties in the matter, but this present arrangement is with a governmental body also under the control of the State and which, by the acts of its creation, is given full power to take over roads and stipulate for the terms in which they will do it."

In these cases it is held in purport and effect, if not in express words, that where there is no legislation providing otherwise, the boards of county commissioners are charged with responsibility for the construction and maintenance of the public roads in their respective counties; that the cost of such construction and upkeep is a necessary expense; that these governmental agencies, the boards of county commissioners and the State Highway Commission, are vested with power to enter into contracts and agreements for the construction of roads forming a part of the State highway system, and that the purpose of the act of 1921, ch. 2, is to encourage coöperation between the highway commission and the county authorities. In the first of these cases (*R. R. v. McArtan*) the board of commissioners, after making a contract with the commission, found it necessary to borrow $100,000, and to this end issued county securities and levied a tax to provide for their payment, and the court not only approved the contract, but declined to restrain the collection of the tax; and in the second (*Lassiter v. Comrs.*), the amount appropriated for building the road on the accepted route was treated as a proper liability of the county. If the contracts set out in these cases were enforceable, we see no sufficient or satisfactory reason why Johnston County, pursuing the same policy and relying on the same principle, could not enter into a valid contract with the highway commission for making the proposed loan.

But against the alleged right of the county to advance the money it is urged on behalf of the plaintiff that the agreement for "fair reimbursement" cannot be enforced against the highway commission, because the county is to be paid by the allocation of money to be raised by the sale of bonds hereafter to be authorized, or by the appropriation of other road construction funds. Accepting as the definition of a contract an agreement enforceable at law made between two or more persons by which rights are acquired by one or more to acts or forbearance on the part of the other or others, we are confronted with the direct question whether the terms of the obligation assumed by the highway commission to reimburse the county are such as will avoid the contract.

As we understand, no point is made as to the right to contract that a debt may be paid out of a particular fund. *Evans v. Freeman,* 142 N. C., 61; *Typewriter Co. v. Hardware Co.,* 143 N. C., 97; *Basnight v. Jobbing Co.,* 148 N. C., 350, 357. The objection stressed is the uncertainty of the fund, or the commission's agreement to create an indebtedness in excess of the funds appropriated to its use. It is contended by the defendants that the force of this objection may depend upon the scope and efficacy of the contract interpreted in the light of the principle which underlies and the purpose which pervades the act by which the highway commission was created; that the act, notwithstanding its diverse subdivisions, is to be regarded as a unified whole; that its chief purpose was to enable the commission as an agency of the State to construct, take control of, and maintain approximately 5,500 miles of dependable highways and thereby to establish a system for the entire State, work on the various links to be of such character as would lead to hard-surfaced construction as rapidly as money, labor, and material should permit; and that it was thought that the work would cover an indefinite period and that the funds necessary for the accomplishment of the ultimate object would be raised from time to time as the work progressed. To the achievement of this end, it is contended, the act contemplates coöperation, unity of purpose, and, as far as practicable, unity of action between the highway commission and the various counties of the State. Public Laws 1921, ch. 2, secs. 2, 3, 10(b), 10(i), 14. Upon this theory the defendants assert that the legislative intent to carry on the work until the highways outlined in the act of 1921 are completed indicates a purpose to provide the necessary funds, from year to year, by issuing bonds and in other ways; that the agreement on the part of the highway commission to pay back the money advanced by the county should be construed in the light of this general legislative policy; and that the principle usually applicable to a promise to make payment out of funds not presently available is not controlling in the present instance.

We need not now determine whether this position is fundamentally sound, for without regard to it the contract, in our opinion, may be sustained. The allocation of funds to be derived from the sale of bonds hereafter to be issued is not the only means provided for satisfaction of the loan. By the terms of the contract, "other road construction funds" may be applied in liquidation. In the answer of the board of commissioners it is said that continuing funds now authorized by legislative provision will entitle Johnston County to an annual road construction fund of about $60,000, which may lawfully be applied in repayment of the money advanced. An allegation substantially to this effect appears in the affidavit made by the chairman of the highway commission. If from this fund there be deducted an amount sufficient to pay the interest on the authorized bonds and to provide a sinking fund for their retirement in addition to the cost of maintenance, the remainder, it is admitted, may be applied on the loan. The sum annually provided in this way is limited, but it may be thus applied, in the words of the contract, "to the extent that it may be sufficient therefor." This in itself is such valuable consideration as will support the contract: a promise by the county to advance the money and a promise by the highway commission to make payment out of funds presently available "to the extent of their sufficiency" for such purpose. No question is made as to the adequacy of the consideration, for the law does not require that the consideration and the thing to be done shall be in exact proportion as to values. "So long as it is something of real value in the eye of the law, whether or not the consideration is adequate to the promise, is generally immaterial in the absence of fraud. The slightest consideration is sufficient to support the most onerous obligation; the inadequacy, as has been well said, is for the parties to consider at the time of making the agreement, and not for the court when it is sought to be enforced." 13 C. J., 365; *Exum v. Lynch*, 188 N. C., 392, 396.

With knowledge not only of its primary responsibility for the construction and upkeep of its public roads, but of the liability of each party to the proposed contract, the board of commissioners of Johnston County, for the purpose of building a part of the highway system, has agreed to advance to the highway commission a fixed sum which is to be repaid by the commission out of designated funds, a part of which is now available; and upon the facts appearing in the record we find no objection that prevents the parties from making and receiving the loan in accordance with their agreement.

The judgment declaring the contract void and continuing the restraining order to the final hearing is, therefore,

Reversed.

COMMERCIAL CASUALTY INSURANCE COMPANY v. DURHAM COUNTY.

(Filed 24 June, 1925.)

1. Principal and Surety—Contracts—Bonds.

A surety on a building contractor's bond has a substantial right in the equity created by a provision reserving a part of the contract price until completion.

2. Same—Equity—Payments.

The owner has an equity in the reserved balance provided for in a building contract, but has no right to waive surety's rights therein.

3. Same—Written Contracts.

The written contract fixes the right and determines the liability of a surety.

4. Same.

Contracts are strictly construed as to sureties to the end that their liability must be found within the terms thereof.

5. Same—Checks Unpaid.

Unpaid checks themselves do not constitute payments.

APPEAL by defendant from *Calvert, J.*, at February Term, 1925, of DURHAM.

Controversy without action submitted by Commercial Casualty Insurance Company and Durham County on account of a matter in difference in a settlement between Durham County, owner, and Commercial Casualty Insurance Company, surety on a building contractor's bond. Judgment for plaintiff. Defendant appealed. Affirmed.

The following facts appear:

The plaintiff, doing a bonding business, executed with Walter Clark, contractor, a bond in the sum of $100,000 for the faithful performance of a contract to build the Durham County Home, on the part of the contractor, and to satisfy all claims and demands incurred for the same; to fully indemnify and save harmless the owner from all cost and damages which it might suffer by reason of his failure to do so. Walter Clark made default in the performance of said contract and abandoned the work thereon 30 October, 1924. Defendant notified plaintiff of the default and that defendant would expect plaintiff to complete the building according to plans and specifications included in the contract.

It was also agreed that "the contract . . . provided that payments to the contractor should be made upon the certificate of the architect of the defendant and that all payments to the contractor were so made. It is also admitted that the contractor was paid the sum of

$27,076.76 in excess of the amount which he was entitled to receive by terms of the contract prior to the date of his default hereinbefore referred to, to which is to be added any unpaid claims for labor and material in or on the job."

Plaintiff agreed to complete the building in accordance with the plans and specifications, but reserved its right to have its liability with reference to the excess payments to the contractor determined. This amount of excess payments is again stated thus: "$27,076.76 and labor and material claims unpaid, which amount it is agreed has been overpaid to said Walter Clark on said contract."

It was further admitted on 15 October, 1924, that the architect approved an estimate rendered him by Walter Clark and directed that a voucher for $15,827 be issued to said Walter Clark by defendant; this voucher was so issued, but before approving the estimate the architect required Clark to issue and mail checks to certain creditors, for labor and material, who had known claims against said contractor. Such checks were issued on the Murchison National Bank of Wilmington, duly presented, but not paid, because said bank had condemned the deposit of Clark and applied it to the payment of notes due said bank by Clark.

The following appears in the contract between Walter Clark and the defendant:

"The architect's status:

"The architect shall have general supervision and direction of the work. He is the agent of the owner only to the extent provided in the contract documents and when in special instances he is authorized by the owner to act, and in such instances he shall upon request show the contractor written authority. He has authority to stop the work whenever such stoppage may be necessary to insure the proper execution of the contract. As the architect is, in the first instance, the interpreter of the conditions of the contract and the judge of its performance, he shall side neither with the owner nor the contractor, but shall use his powers under the contract to enforce its faithful performance by both.

"Certificates and Payments:

"If the contractor has made application as above, the architect shall, not later than the date when each payment falls due, issue to the contractor a certificate for such amount as he decides to be properly due. No certificates issued nor payment made to the contractor, nor partial or entire use or occupancy of the work by the owner, shall be an acceptance of any work or materials not in accordance with this contract. The making and acceptance of the final payment shall constitute a

waiver of all claims by the owner, otherwise than under articles 16 and 28 of these conditions or under requirements of the specifications, and of all claims by the contractor, except those previously made and still unsettled. Should the owner fail to pay the sum named in any certificate of the architect or in any award by the arbitrators upon demand when due, the contractor shall receive, in addition to the sum named in the certificate, interest thereon at the legal rate in force at the place of building.

"Payments Withheld:

"The architect may withhold or, on account of subsequently discovered evidence, nullify the whole or a part of any certificate for payment to such extent as may be necessary to protect the owner from loss on account of:

"(a) Defective work not remedied.

"(b) Claims filed or reasonable evidence indicating probable filing of claims.

"(c) A reasonable doubt that the contract can be completed for the balance then unpaid.

"(d) Damage to another contractor under article 38. When all the above grounds are removed, certificates shall at once be issued for amounts withheld because of them."

By virtue of the building contract, Clark, the contractor, was to provide all material and perform all work shown on drawings or in specifications.

The court rendered the following judgment:

"Now, therefore, upon the facts stated, the court is of the opinion and so adjudged that the Commercial Casualty Insurance Company is, and the same is hereby, relieved from liability on account of its bond to the amount of $27,076.76, and the amount of unpaid bills that were due on the job at the time of the abandonment of the contract by the contractor, Walter Clark, which amount of unpaid claims for labor and material includes the checks issued by the contractor and unpaid by the Murchison National Bank."

The defendant's exception to the judgment is the only question presented.

B. H. Bratney, S. Brown Shepherd, and Fuller & Fuller for plaintiff.
Brogden, Reade & Bryant, and J. S. Manning for defendant.

VARSER, J. The contract provision that 85 per cent of the value of labor and material used during the previous month, as estimated by the architect, shall be paid by the owner to the contractor at the dates

specified during the progress of the work creates in the 15 per cent reserve balance an equity in which the surety has a substantial right. While the owner also has an equity in this reserved balance, he has no right, without the consent of the surety to waive it, or to exceed the provisions of the contract in making payments to the contractor. The retained balance is well calculated to induce the contractor to complete the building, and it is valuable security against loss when a breach occurs. Clark defaulted 30 October, 1924. The excess payments were made 15 October, 1924.

The contract as written, and not otherwise, fixes the rights and determines the liability of the surety. Sureties have a right to stand on the terms of their contract, and, having consented to be bound to the extent expressed therein, their liability must be found therein and strictly construed. *Glenn County v. Jones* (Cal.), 80 Pac. Rep., 695; *Morgan v. Salmon,* (N. M.), 135 Pac. Rep., 553; *Calvert v. London Dock Co.,* 2 Keen, 639; *Prairie State Bank v. U. S.,* 164 U. S., 227; *Kunz v. Boll* (Wis.), 121 N. W., 601; *Warehouse Co. v. Green* (Ga.), 87 S. E., 826; *Webb v. Lee* (Wis.), 194 N. W., 155; *Y. M. C. A. v. U. S. Fidelity & Guaranty Co.,* 90 Kans., 332; 133 Pac., 894; 55 L. R. A. (N. S.), 170; *First National Bank v. Fidelity & Deposit Co.,* 5 L. R. A. (N. S.), 418; *Greenville v. Ormand,* 51 S. C., 121; Brandt on Suretyship and Guaranty, 578; Stearnes on Suretyship, 108; *Kimball v. Baker,* 62 Wis., 526; 9 C. J., 862; 32 Cyc., 223; *Gray v. Putnam* (S. C.), 28 S. E., 148; *Fidelity Deposit Co. v. Agnew,* 152 Fed., 956; *Miller v. Stewart,* 22 U. S., 680.

Our own authorities proceed upon this principle. *Cooper v. Wilcox,* 22 N. C., 90; *Bell v. Howerton,* 111 N. C., 69; *Purvis v. Carstaphan,* 73 N. C., 575; *Carriage Co. v. Dowd,* 155 N. C., 307; *Mfg. Co. v. Holladay,* 178 N. C., 417.

The defendant contends that these excess payments to Clark constitute an alteration in the terms of the contract, and that the plaintiff, therefore, is not relieved. The record discloses no alterations in the terms of the contract or in the work to be done under it, as contemplated by the bond.

A violation of the contract is not an alteration. If this were true, no violation could occur when the contract provided as in the instant case, for the contract would alter itself to meet the breaches. *Blackman v. Morel* (Ga.), 79 S. E., 492. *Guttenberg v. Vassel,* 74 N. J. L., 553, is not in conflict, but in affirmance of the rule herein declared. The sureties in that case were held liable on account of a provision in the contract that payments to the contractor, "in advance or contrary to the terms of the contract," would not render the contract void and would not relieve the surety.

The instant case is between the surety and the owner, and the material men and laborers are not parties. Hence, it is unnecessary and improper to determine their rights. The checks which were not paid do not constitute payments. *Graham v. Warehouse,* 189 N. C., 533; 30 Cyc., 1265; 21 R. C. L., 60.

We are advertent to authorities that seem to hold to the contrary. Upon an examination, many of these are upon different facts, or openly accept a different view; in some instances this is in obedience to legislative enactments. We prefer to follow those authorities which uphold the right to contract and to abide by the terms thereof when made. Parties may then act in accordance therewith and in full appreciation of such rights and liabilities as are fixed by their agreements.

Therefore, let the judgment appealed from be

Affirmed.

D. M. ELLIOTT AND V. J. COGGIN v. TALLASSEE POWER COMPANY.

(Filed 24 June, 1925.)

1. Issues—Pleadings—Appeal and Error.

Issues clearly and fully arising from the pleadings and supported by the evidence are not subject to exception that those submitted by appellant should have been accepted by the court.

2. Nuisance—Special Damages—Pleadings—Evidence.

A civil action for damages for the maintenance of a public nuisance, without allegation or evidence that the plaintiff has been specially or peculiarly damaged, will not lie; and where the damages are recoverable the plaintiff must allege and show an injury suffered by himself.

3. Evidence—Photographs.

Witnesses may use photographs for the purpose of explaining their testimony relevant to the inquiry, under proper safeguard confining the photographs to this purpose alone, though they are not introduced in the case as substantive evidence.

4. Evidence—Health—Opinions of Supreme Court—Appeal and Error—Harmless Error.

In an action to recover damages to plaintiff's health by defendant's ponding water near his dwelling, caused by the bites of mosquitoes bred by the waters ponded, it is improper for an opinion of the Supreme Court on the subject to be read to the jury, either by court or counsel, for the purpose of establishing a fact or theory, but the party who contends that the theory thus read is a correct one cannot successfully complain on appeal.

ELLIOTT *v.* POWER CO.

APPEAL by plaintiffs from *Sinclair, J.*, at April Term, 1924, of MONTGOMERY.

Action by plaintiffs, land owners, alleging that the defendant had impounded waters on Yadkin River from which the public, as well as plaintiffs as individuals, had suffered damages, asking that such ponding of waters be abated as a public nuisance and for damages. Upon a jury verdict, judgment was rendered for the defendant. Plaintiffs appealed. No error.

Plaintiffs complained that the defendant constructed a dam across Yadkin River at the Narrows, which has impounded the waters into an immense pond extending up said river and out into Montgomery County near plaintiffs' lands. Plaintiffs specified special and peculiar damages in covering a public road with water so that a ferry was used instead of a bridge, and in so infecting the health of the community, including plaintiffs and their families, with malaria resulting from a multitude of malaria-bearing mosquitoes from defendant's pond and otherwise making plaintiffs' property less valuable.

The defendant denied that it created a public nuisance and that the plaintiffs had suffered special or peculiar damages therefrom, but admitted that it had impounded the waters of Yadkin River, and alleged that it had legislative permission to flood the road, sanctioned by the road-governing body of the township, and that it had improved the facility of passage over the river by the use of a ferry, instead of the old bridge, and that it had properly guarded the health of the community in the care of its pond and that plaintiffs' health had not been infected by malaria caused by defendant, but that plaintiffs' families had been infected with malaria arising from other causes in the vicinity, such as mosquito-breeding places on plaintiffs' lands and elsewhere, from which a malaria epidemic had resulted.

There was evidence tending to establish the contentions of the respective parties.

His Honor submitted the following issues:

"1. Has defendant created and maintained a public nuisance by obstructing a public road, as alleged in the complaint? Answer: No.

"2. If so, has the plaintiff, D. M. Elliott, been damaged in a special and peculiar way by reason thereof? Answer: ——.

"3. If so, has the plaintiff, V. J. Coggin, been damaged in a special and peculiar way by reason thereof? Answer: ——.

"4. Has defendant created and maintained a public nuisance with respect to health and comfort, as alleged in the complaint? Answer: No.

"5. If so, has the plaintiff, D. M. Elliott, been damaged in a special and peculiar way thereby? Answer: ——.

"6. If so, has the plaintiff, V. J. Coggin, been damaged in a special and peculiar way thereby? Answer: ——.

"7. What damage, past, present, and prospective, is D. M. Elliott entitled to recover of the defendant? Answer: ——.

"8. What damage, past, present, and prospective, is V. J. Coggin entitled to recover of the defendant? Answer: ——."

Plaintiffs tendered the following issues, which the court declined to submit to the jury:

"1. Has the defendant maintained its dam and pond near the premises of the plaintiffs in such a manner as to be a breeding place for the Anopheles mosquito and in such a manner as to cause injury, annoyance, and discomfort to the plaintiffs, as alleged in the complaint? Answer: ——.

"2. Has the defendant by said pond wrongfully obstructed the public highway of Montgomery County to the annoyance and injury of plaintiffs, as alleged in the complaint? Answer: ——.

"3. What damage has the plaintiff, D. M. Elliott, sustained thereby? Answer: ——.

"4. What damage has the plaintiff, V. J. Coggin, sustained thereby? Answer: ——.

"5. Is the maintenance of said dam and pond as aforesaid a public nuisance? Answer: ——."

The jury for their verdict answered the first issue submitted to them "No" and the fourth issue "No," and the court rendered judgment in favor of the defendant.

B. S. Hurley, W. A. Cochran, J. A. Spence, C. C. Broughton for plaintiffs.

R. T. Poole, R. L. Smith & Son, Manly, Hendren & Womble for defendant.

VARSER, J. Plaintiffs complain that the issues submitted were prejudicial and that the court ought to have submitted the issues they tendered. The issues submitted by the court not only followed the pleadings, but present the questions arising when a public nuisance is alleged with special and peculiar damages to individuals. *McManus v. R. R.*, 150 N. C., 655; *Pedrick v. R. R.*, 143 N. C., 485.

The issues arise on the pleadings (*Geddie v. Williams*, 189 N. C., 333; *DeLoache v. DeLoache*, 189 N. C., 394), and when the plaintiffs allege a public nuisance they cannot successfully complain that the court submitted issues in exact accord with the pleadings.

Issues concern both plaintiff and the defendant; they have mutual rights therein, and it is not error to submit an issue which follows the

allegations, if the allegations are otherwise sufficient in law to raise an issue which is either the cause of action or an integral part thereof.

As to the form of the issues, they are sufficient if they allow both parties to introduce all pertinent evidence and apply it fairly. *DeLoache v. DeLoache, supra.*

The plaintiffs have alleged definitely a public nuisance, not only affecting the public, but they allege special and peculiar damages involving a physical interference with both their personal and property rights. The law is searching and adequate to afford an injured person ample redress. Equitable or legal remedies, or both, will be used, if necessary, to afford complete relief. Of course, in case of a public nuisance interfering only with a public or common right, an action by an individual will not lie; but if this public nuisance is an invasion of private right and causes injury, annoyance, and discomfort to one or more persons, which may come within the sphere of its operation, then a suit at the instance of an individual will lie for damages or abatement, or both, as the nature of the proof may warrant. *McManus v. R. R., supra; Mfg. Co. v. R. R.,* 117 N. C., 579; *Cherry v. Williams,* 147 N. C., 452; *Pedrick v. R. R., supra; Raleigh v. Hunter,* 16 N. C., 12; *R. R. v. Baptist Church,* 108 U. S., 317; *Powell v. Furniture Co.,* 34 W. Va., 804; *District Attorney v. Ellen B. R. R. Co.,* 16 Gray, 242.

Plaintiffs alleged a public nuisance and special and peculiar damages; it was, therefore, incumbent upon them to establish, not only the public nuisance, but the special and peculiar damages, in order to recover.

The trial court did not require the plaintiffs to carry a burden heavier than they alleged as a basis for recovery. The charge of the court below is an able and clear statement of the law. The court was careful to allow the plaintiffs an opportunity to submit all competent evidence to the jury as to the nuisance alleged and the damages alleged, and to apply it fairly.

Every right of the plaintiffs has been carefully guarded and preserved. The charge is fully sustained. *Pruitt v. Bethell,* 174 N. C., 454.

Plaintiffs excepted because certain pictures were submitted to the jury. All of these pictures were used to explain the witnesses' testimony to the jury. It was not error for the court to allow the jury to consider the pictures for this purpose and to give them such weight, if any, as the jury may find they are entitled in explaining the testimony. The charge shows plainly that the court was careful to apply this rule to use of the pictures offered by either side, and when the charge is considered contextually, it appears that the court was cautioning the jury not to consider pictures not in evidence.

When the ruling in the admission of the pictures and the charge of the court are considered together, we are of opinion that the principle announced in *Dobson v. Whisenhant,* 101 N. C., 645; *Morse v. Freeman,* 157 N. C., 385; *Burwell v. Snead,* 104 N. C., 118; *Hoyle v. Hickory,* 167 N. C., 619, has not been violated, but has been upheld.

Plaintiffs further except because the court read to the jury from *Rice v. R. R.,* 174 N. C., 268, as to malaria and its infection into the human system by the female Anopheles mosquito. We do not think it was proper to read to the jury from an opinion of this Court, either in the argument of counsel or in the charge of the court, for the purpose of establishing a fact or a theory in an inductive science (*Huffman v. Click,* 77 N. C., 55). Plaintiffs' exception shows no prejudicial error, for that the excerpt so read to the jury is in exact accord with the theory upon which the case was tried by both plaintiffs and the defendant, and is in strict harmony and support of plaintiffs' allegations as to the cause of the malaria.

It appears from the evidence, and the jury has evidently so found, that the road complained of was not obstructed beyond the defendant's right so to do, according to legislative authority and its agreement with the supervisors who had charge of the same.

There are other exceptions to the admission and to the rejection of evidence. None of these show prejudicial error.

Upon the whole record it appears that the jury has determined a pure question of fact. The charge of the learned and careful judge who tried the case below affords no ground for just complaint. It is a clear, adequate, and definite statement of the law. Therefore, there is

No error.

F. L. ABERNATHY AND WIFE, MINNIE H. ABERNATHY, v. J. M. SKIDMORE, J. M. CHERRY, S. H. JOHNSTON AND WIFE, M. WILLIE JOHNSTON; OLLIE HERMS AND HER HUSBAND, R. L. HERMS; LUCRETIA RAFTER AND HER HUSBAND, WILL RAFTER; ELLA YANDLE AND HER HUSBAND, A. F. YANDLE, AND E. B. JOHNSTON AND WIFE, WILLIE JOHNSTON.

(Filed 24 June, 1925.)

Evidence—Deceased Persons—Statutes.

C. S., 1795, prohibiting a witness from testifying to transactions and communications with a deceased person under whom the witness claimed title to lands in dispute in the action, does not exclude the testimony of the witness to a conversation between the deceased person and another, who was alive at the time.

ABERNATHY *v.* SKIDMORE.

APPEAL by plaintiffs from *Long, J.*, and a jury, at Special Term, June 16, 1924, of GASTON.

Action to reform and correct certain deeds for mutual mistake.

L. D. Johnston owned certain land in Mt. Holly, and he and his wife, on 14 December, 1907, deeded certain land and the "land in controversy" to defendant, J. M. Skidmore. Deed recorded in Book 72, p. 111.

On 28 December, 1918, the heirs of L. D. Johnston conveyed to J. M. Cherry certain land in Mt. Holly, omitting the "land in controversy." Deed recorded in Book 179, p. 426. Plaintiffs claim that J. M. Cherry, on 7 October, 1922, although contracting to do so, conveyed certain land in Mt. Holly, omitting the "land in controversy." Deed recorded in Book 154, p. 598. In this deed is the following: "The exceptions are contained in the deed executed to said Skidmore by said L. D. Johnston and wife, which is recorded in deed book 72, p. 111, in the office of the Register of Deeds of Gaston County, North Carolina."

The plaintiffs claim that prior to 7 October, 1922, J. M. Cherry and wife, in consideration of $4,500, contracted and agreed to sell plaintiffs certain land in the town of Mt. Holly, describing the land agreed to be conveyed. W. B. Rutledge, a justice of the peace, was selected to draw the deed. That believing and relying on the deed as drawn as conveying the land agreed, the consideration was arranged and the deed delivered and recorded in Register of Deeds' office for Gaston County, Book 154, p. 598.

"That the plaintiffs relied on said deed conveying the lands as contracted to be conveyed as aforesaid without any exceptions, and discovered no exceptions in such deed until on or about the —— day of May, 1923, when the defendant, J. M. Skidmore, claimed that the said lands so conveyed had been conveyed to him and that he was claiming the title and an interest in the same; whereupon the plaintiffs examined their deed and found the exceptions therein as appear from such deed." Then this action was brought by plaintiffs against J. M. Cherry, L. D. Johnston's heirs, and J. M. Skidmore, to correct or reform the deeds for mutual mistake.

The prayer of plaintiffs is as follows:

"1. That it be declared that the deed executed by said L. D. Johnston and wife to said J. M. Skidmore be reformed to conform to what was intended to be conveyed therein, as hereinbefore alleged.

"2. That the deed from the said Johnston heirs to the said J. M. Cherry be corrected and reformed so that it conveys what was intended to be conveyed by the said Johnston heirs to the said J. M. Cherry, as hereinbefore set out as aforesaid.

"3. That the deed from the said J. M. Cherry and wife to the plaintiffs be corrected and reformed so that the exceptions be stricken therefrom and the deed convey fully such lands as were intended to be conveyed by the said J. M. Cherry and wife to the plaintiffs.

"4. That if the said deeds are not corrected and reformed so as to give and grant to the plaintiffs a full and indefeasible title to the aforesaid lands, then, in that event, that the plaintiffs recover a judgment against the defendant, J. M. Cherry, and against the said Johnston heirs, in the sum of $6,500 for the breach of covenants contained in the said deeds executed by the said Johnston heirs and the said Cherry and wife.

"5. And that it be declared that the said J. M. Skidmore nor any other person than the plaintiffs have any interest or title, or are entitled to the possession of the said lands, and that the cloud, as aforesaid, be removed from the said land."

All the issues were answered by the jury in favor of defendant Skidmore.

Plaintiffs made numerous exceptions and assignments of error and appealed to the Supreme Court.

Mangum & Denny for plaintiffs.
Mason & Mason and A. C. Jones for defendant J. M. Skidmore.

CLARKSON, J. It is with some reluctance that we feel compelled to send this action back for a new trial. The case seems to have been carefully tried in the court below by the able and distinguished jurist, who for long years adorned the Superior Court bench and has since died.

Plaintiffs' exception and assignment of error No. 2,—"to the exclusion by the court below of certain evidence as hereafter appears: Mrs. Ollie Herms, witness for plaintiff.

"Q. Just state what that conversation was?

"Objection by defendant, J. M. Skidmore, on the ground that this is in purview of C. S., 1795. Counsel states that the witness is a defendant and an heir at law of the grantor, L. D. Johnston, who is dead. The defendant, Skidmore, objects to anything that was said by the witness' father, L. D. Johnston, on the following grounds: That such evidence is not admissible. The witness is not competent to testify as to the transaction or communication of her father, L. D. Johnston, because the witness is a party defendant and is called as a witness by the plaintiffs; that the plaintiffs derive a title through the witness, who claims title from her father, L. D. Johnston; that L. D.

Johnston is deceased; that the witness proposes to testify as to a transaction or communication with the deceased; that the witness is nominally a defendant, but in fact a plaintiff, as her interest is practically the same as the plaintiffs; that the matter and thing as to which the witness is asked to testify is not against the interest of the witness, but is in behalf of the interest of the witness and the plaintiffs and is against the interest of the defendant, J. M. Skidmore.

"Court: The court having sent the jury out at this time, the evidence of the witness is taken as follows; that the court may pass on same:

"Q. Just state what that conversation was. The conversation that took place between your father and Mr. J. M. Skidmore. State what was said?

"Ans. Well, I heard my father tell Mr. Skidmore he would sell him the tract of land south of this street, the first street below the house, extending west to Dutchman's Creek, for $225. Mr. Skidmore said he would take it. That is all."

C. S., 1795, is as follows: "Upon the trial of an action, or the hearing upon the merits of a special proceeding, a party or a person interested in the event, or a person from, through or under whom such a party or interested person derives his interest or title by assignment or otherwise, shall not be examined as a witness in his own behalf or interest, or in behalf of the party succeeding to his title or interest, against the executor, administrator or survivor of a deceased person, or the committee of a lunatic, or a person deriving his title or interest from, through or under a deceased person or lunatic, by assignment or otherwise, concerning a personal transaction or communication between the witness and the deceased person or lunatic; except where the executor, administrator, survivor, committee or person so deriving title or interest is examined in his own behalf, or the testimony of the lunatic or deceased person is given in evidence concerning the same transaction or communication."

The question for our decision: Mrs. Ollie Herms is a daughter of L. D. Johnston, from whom the defendant J. M. Skidmore claims title to his land. Skidmore is living, Johnston is dead. Mrs. Ollie Herms, admitting she is interested in the event, is not testifying "concerning a personal transaction," etc., but is testifying to a conversation had between her dead father and Skidmore. The mischief the statute was passed to prevent was the giving of testimony by a witness interested in the event as to a personal transaction or communication between witness and the deceased person whose lips are sealed in death. Mrs. Herms heard the conversation between her father and the defendant Skidmore, who is living and a party defendant. We think the testimony

competent. *Reece v. Woods,* 180 N. C., 631; *Johnson v. Cameron,* 136 N. C., 243; *Highsmith v. Page,* 161 N. C., 355; *Zollicoffer v. Zollicoffer,* 168 N. C., 326. We confine our decision strictly to the language in the statute. We are not inadvertent to the interesting situation disclosed in *Brown v. Adams,* 174 N. C., 490.

For the reasons given, there must be a

New trial.

CORPORATION COMMISSION AND CITY OF HENDERSON v. HENDERSON WATER COMPANY.

(Filed 24 June, 1925.)

Corporation Commission—Corporations—Judgment—Appeal and Error—Presumptions — Evidence — Burden of Proof—Cities and Towns—Franchise—Municipal Corporations.

The Corporation Commission is empowered by statute to fix just and reasonable rates or charges for the services rendered by certain public-service corporations, including water companies within the incorporated limits of a city or town, C. S., 2783, upon certain evidence specified by the statute, C. S., 1068, the rate so fixed being taken as prima facie just and reasonable, C. S., 1067; and where a user of the public service appeals to the court claiming the rates fixed by the commission were unreasonable or excessive, it is required of him to show by his evidence upon the trial the truth of his contention, and in the absence of such evidence it is not erroneous for the trial judge to instruct the jury to find in favor of the justness of the rates so fixed by the commission, though it appears that these rates were in excess of those fixed by the franchise of the public-service corporation granted by the city or town.

CLARKSON, J., dissenting.

APPEAL by city of Henderson from *Bond, J.,* at October Term, 1924, of VANCE.

On 27 September, 1922, Henderson Water Company filed its petition with the Corporation Commission of North Carolina praying said commission to establish and put into effect a schedule of rates to be charged by said water company for services to be rendered by it to the city of Henderson and its inhabitants. Upon notice of the filing of said petition, the city of Henderson filed answer thereto, denying that the schedule of rates proposed by the petitioner was reasonable, and alleging that the schedule then in force, pursuant to the contract between the city and the water works was reasonable, and ought to remain in force. The Henderson Water Company, pursuant to contract, based upon an ordinance of said city, has a franchise to furnish water to the city of Henderson and its inhabitants for 40 years, from the year 1892. Rates

to be charged for service under said franchise are fixed in the contract. After a full hearing of testimony and consideration of arguments and briefs, the commission found that a schedule of rates, as set out in its order, was reasonable. It was ordered that the schedule of rates in force prior to the filing of the petition for hydrant service might be increased by petitioner ten per cent, and that the schedule of rates, found by the commission to be reasonable, applicable to meter readings might be charged for and after the month of April, 1923. Except as and to the extent granted, the petition was denied. This order is dated 29 March, 1923. A supplemental order was entered by the commission on 9 April, 1923, applicable principally to maximum rates for automatic sprinklers.

The city of Henderson and certain interested parties filed exceptions to said order and supplemental order, which were overruled by the commission. The cause was then heard, upon appeal to the Superior Court of Vance County. Judgment was rendered therein as follows:

"This cause coming on to be heard before his Honor, W. M. Bond, judge presiding and a jury, upon appeal by defendants (city of Henderson and other interested parties) from an order of the North Carolina Corporation Commission establishing water rates to be charged by the Henderson Water Company, and an issue having been submitted and answered as follows:

"Are the rates fixed in this cause by the Corporation Commission, regulating prices of water supply, just and reasonable? Answer: 'Yes.'

"Now, on motion of J. H. Bridgers, J. P. Zollicoffer and Thomas M. Pittman, attorneys for plaintiff (Henderson Water Company)

"It is considered and adjudged that the orders of said commission establishing such charges or rates are hereby affirmed and the commission is authorized to proceed in the enforcement thereof until changed as provided by law.

"The defendants (city of Henderson and other interested parties) having contended that the rates named by the Corporation Commission are in excess of those fixed by contract between the city of Henderson and the Henderson Water Company and in violation of such contract, and that the procuring authority for and charging such rates by the water company is such a breaking of the contract that the city of Henderson is entitled to have rescission and cancellation thereof, and asked the court to hold and adjudge that the contract is thereby abrogated, and the defendants (city of Henderson and other interested parties) relieved from all and every obligation and liability in respect thereof:

"Such motion and application of the defendants is denied and the court holds and so adjudges, that such contract was made in subordination to the police power of the State, which may be rightfully invoked

by either party thereto, and subject to a fair exercise of such police power, is equally binding and obligatory upon all the parties thereto.

"It is further adjudged that plaintiff recover of defendants the cost of the action to be taxed by the clerk.

"W. M. BOND, *Judge Presiding.*"

From said judgment, city of Henderson appealed to the Supreme Court, assigning errors based upon exceptions.

Perry & Kittrell and Hicks & Son for city of Henderson.

Jere P. Zollicoffer, J. H. Bridgers and Thomas M. Pittman for Henderson Water Company.

CONNOR, J. At the close of all the evidence, the court instructed the jury upon the issue submitted, to wit: "Are the rates fixed in this cause by the Corporation Commission, regulating the price of water supply, just and reasonable," to answer the same "Yes." Under this instruction, the jury so answered the issue. Appellant, city of Henderson, excepted to this instruction and assigns same as error.

Petitioner is a public-service corporation, and the Corporation Commission is vested by law with full power and authority to fix and establish any and all rates which it may charge for services rendered by it. C. S., 2783. When the Corporation Commission is called upon, by either the corporation or those to whom the services are rendered, under its franchise, to exercise this power and authority, it is its duty to fix and establish just and reasonable rates to be charged for such service. The rates or charges, established by the commission, shall be deemed just and reasonable, C. S., 1067. The burden was therefore upon appellant to offer evidence sufficient for the jury to find upon appeal and under the instructions of the court, that the schedule of rates, established by the commission, in this case, were not just and reasonable to both petitioner and respondent.

Upon a careful consideration of the evidence, as set out in the statement of the case on appeal, we must sustain the instruction of the court. The evidence chiefly relied upon by appellant is the testimony of Mr. W. A. Hunt. This witness is a member of the city council, and is by profession a banker. He was one of the receivers of petitioner, appointed by the court on 13 October, 1921, and discharged when its property was restored to appellee by the court on 3 July, 1922. He testified that the books of the water company showed that its property cost $162,000; that allowing 1% a year during the life of the property to cover depreciation, he was of the opinion that the present fair value of the property was $115,000. He was also of the opinion that the

property would pay a fair return under proper management at the rates allowed under the franchise. He expressed the opinion that these rates were reasonable and that he was qualified to so state. He considered the ratio of expenses to income too high. He had no information as to the cost of additions to the property since he was discharged as receiver in 1922, but knows that considerable additions have been made under the orders of the city. He was further of opinion that the company employed more clerks in the office than was necessary for the conduct of its business.

There was evidence also that the plant was sold in 1894 under a decree of foreclosure and conveyed to a trustee for creditors by deed, in which the recited consideration was $32,101; that the income for 1920 was $27,385.94, and that the value as assessed for taxation in 1920 was $46,000; the tax valuation for 1924 was $75,000. During a period of five years—from 1917 to 1922—the rates charged were less than the maximum fixed by the contract. Several customers of the water company testified as to the increase in amounts paid by them under the rates fixed by the Corporation Commission. One of these customers operated a public swimming pool, another was the manager of a hotel, and another of the American Cotton Oil Company.

There was no evidence offered by appellant from which the jury could have found the facts which, under C. S., 1068, the Corporation Commission is required to consider in fixing maximum rates to be charged by corporations subject to its power and authority as to these matters. The burden was upon appellant and, therefore, the assignment of error cannot be sustained. There was evidence offered by appellee sufficient to sustain the rates established by the Corporation Commission.

At the beginning of the trial, and again at the close of all the evidence, the city of Henderson moved the court to hold that the rates fixed by the contract between the city of Henderson and the Henderson Water Company were binding upon the company, and that neither the Corporation Commission nor the court had power or authority to change these rates within forty years, the life of the contract. The motion was denied; appellant excepted and assigns same as error.

The ruling of the court is sustained by the decision of this Court in *Griffin v. Water Co.*, 122 N. C., 210; *In re Utilities Co.*, 179 N. C., 151; *Corporation Commission v. Mfg. Co.*, 185 N. C., 17.

The power conferred by its charter upon the city of Henderson "to provide water and lights and to contract for same, provide for cleansing and repairing the streets, regulate the market, take proper means to prevent and extinguish fires," is subject to the police power of the State, with respect to rates to be charged under such contracts as the city may make under its charter by a public-service corporation.

Constitution of N. C., Art. VII, sec. 12, sec. 14; Art. VIII, sec. 1. This assignment of error cannot be sustained.

The city of Henderson moved the court, in view of its ruling that the Corporation Commission had the power to change the rates, to hold that the change of the rates in the exercise of this power upon the application of the water company and the charging for service provided by the contract at the rates established by the commission in excess of the contract rates, was such a material change and alteration of the contract or franchise as to release the city of Henderson from the obligation of the contract. Defendant excepted to the refusal to so hold and assigns same as error.

This proposition of law is not material to this controversy and is not presented on the record. We, therefore, do not now decide the question presented by this assignment of error.

We have considered the assignments of error based upon exceptions to rulings upon evidence. We find no error in such rulings and do not deem it necessary to discuss them. Upon consideration of each of the assignments of error, we affirm the judgment. There is

No error.

CLARKSON, J., dissenting.

A. E. FINGER AND D. E. RHYNE v. REX SPINNING COMPANY AND PRISCILLA SPINNING COMPANY.

(Filed 24 June, 1925.)

1. Injunction—Trespass — Sewerage — Nuisance—Findings—Evidence—Appeal and Error.

Upon motion to continue a restraining order to the hearing of the cause, it appeared on appeal from the judgment of the lower court and the judge's findings of fact that defendants operated cotton mills on their lands adjoining those of the plaintiffs, employing a large number of operatives, maintained a septic tank on their own land for sewerage, which emptied with increased volume of water into a stream thereon and *was conveyed* thereby to plaintiffs' lands, to the damage of the health of plaintiff and his family residing thereon: *Held*, this conduct of defendants was a continuous trespass or nuisance on plaintiffs' rights and property, and there being conflicting evidence to support these findings, the restraining order was properly continued to the hearing.

2. Same—Appeal and Error—Evidence—Review.

Upon appeal from an order continuing a restraining order to the final hearing involving the question of defendants committing a nuisance to the injury of the plaintiffs' health while residing on adjoining lands: *Held*, the evidence upon which the judge based his findings of fact is reviewable.

3. Same—Public Interests—Damages.

The operation of a cotton mill for defendants' advantage or profit does not so affect the public interest as to permit them to maintain a nuisance to the injury of the health of the family of an adjoining owner, upon compensation in damages.

APPEAL by defendants from order by *Harding, J.*, for the Fourteenth Judicial District, at chambers, 15 April, 1925. From GASTON.

Pursuant to an order to show cause why an injunction against them, as prayed for in the complaint, should not be granted, defendants appeared before Judge Harding at Charlotte, N. C., on 15 February, 1925. From affidavits filed by plaintiff and defendants and duly considered by the court, the court found "as facts that each of the defendants has discharged and permitted the discharge and is discharging and permitting the discharge of offensive and polluting matter upon the lands of the plaintiff, Finger, and in the stream running through said lands described in the complaint, to the great and irreparable damage of the plaintiff, Finger, and that said defendants threaten and intend to continue the said injurious acts unless restrained therefrom by this court; and that each of said defendants has diverted and is diverting water poured from deep wells upon their premises through their respective sewerage systems into the said streams flowing through the lands of the plaintiff, Finger, where the water from such wells would not have flowed but for such diversion, thereby increasing the flow of said stream."

Upon these facts it was ordered, adjudged, and decreed "that the defendants, Rex Spinning Company and Priscilla Spinning Company, and each of them and their respective officers, agents, servants, and employees, be, and they are hereby, forbidden, enjoined, and restrained until the trial of this cause from discharging or causing or permitting the discharge of any sewage or fluids or matter from the sewerage of said defendants, or either of them, or from discharging or causing or permitting the discharge of any offensive or polluting fluids or matter upon the lands of the plaintiff, Finger, or into or near the stream running through and upon the lands of said plaintiff described in the complaint."

In order that defendants might have time within which to make such changes in their respective sewerage systems as might be necessary in order to comply with said order, it is expressly provided that said injunction or restraining order should not be effective until 14 July, 1925, and that the same should take effect in all respects on said date. It was further ordered that plaintiffs, before said order should be served upon defendants, give an undertaking in the sum of $15,000, to be approved by the clerk, and conditioned as required by C. S., 854.

Defendants excepted to said order and appealed to the Supreme Court. The only assignment of error is based on the exception to the order as signed by the judge.

Cansler & Cansler and Mangum & Denny for plaintiff.

F. M. Shannonhouse and Parker, Stewart, McRae & Bobbitt for Rex Spinning Company.

Garland & Austin for Priscilla Spinning Company.

CONNOR, J. Plaintiff, A. E. Finger, owns a tract of land, situate in Gaston County, containing 133 acres, more or less, upon which are located a comfortable and commodious dwelling-house occupied by plaintiff as his home, tenant houses, stables and other buildings required for the use of said land as a farm; plaintiff, D. E. Rhyne, has an interest in said land as mortgagee.

Defendants are corporations engaged in the business of operating cotton factories; each defendant owns lands situate south of the land owned by plaintiff, upon which are located manufacturing plants and tenement houses for its operatives and employees; each defendant has about 250 employees, who, with their families, make the population of each village owned by said defendants, respectively, not less than 500 persons; each defendant has and maintains on its land, for the use of its plant and of its village, a water and sewerage system; the sewage from the water-closets, sinks, and other outlets used by defendant and its employees living in said village is carried by pipes to a structure located on said defendant's land, constructed and maintained as a septic tank; the sewage and water from each septic tank flows from said tank into a small stream running through the land of defendant and thence through the land of plaintiff.

Plaintiff contends that the water which flows from the tanks into the stream which runs through his land is polluted, and that by reason of such pollution and of the matter which it carries onto and through his land emits obnoxious and offensive odors; that the water in said stream is thereby rendered unfit for use, and that the value of his farm is thereby greatly diminished; that the portion of his land lying on and adjacent to said stream is valuable chiefly as a pasture, and that by reason of the pollution of the water in said stream he has been forced to abandon the use of said land as a pasture for milch cows. Defendants admit that the water from the septic tanks on the lands of each flows into the stream which runs through plaintiff's land, but deny that same is polluted or that there are any injurious consequences to plaintiff or his land from the maintenance of said tanks or the flow of water therefrom. Each defendant contends that the continued operation of its septic tank from which water flows through the stream run-

ning from its land through the land of plaintiff is essential to the health and comfort of its employees and their families and to the conduct of its business; that the benefits accruing therefrom to each defendant and its employees are so great as compared to the injury done to plaintiff that an order enjoining and restraining the further operation of said septic tanks ought not to be made by the court.

There is evidence to the effect that the natural drainage of a considerable area of the lands of each defendant is not into the stream running through and from said lands onto and through the lands of plaintiff; that each defendant has constructed and maintains on its land an elevated tank into which water is pumped from a deep well on said land, and that water from this elevated tank is forced through pipes into the septic tank on said land and is thence discharged into the stream, thus being diverted into and increasing the flow of water in the stream running through the lands of plaintiff. There is evidence to the contrary with respect to the natural drainage. Defendants contend that both the diversion and increase of flow is so inconsequential as to invoke the maxim, *de minimis non curat lex.*

There is no controversy between the parties to this action as to the fact that each defendant by the operation of its sewerage plant is discharging water from its septic tank into the stream which flows from said land through the land of plaintiff. The only controversy on this phase of the case is as to the condition of the water thus discharged and its effect upon plaintiff and this land. The court found that this water was polluted by reason of having passed through the septic tank; that it was offensive because of the matter which it contained, and that it caused irreparable damage to plaintiff; further, that defendants threaten and intend to continue the discharge of said water unless restrained. There is evidence sustaining this finding of the court.

The court further found that each defendant has diverted and is diverting water pumped from deep wells on its land through its septic tanks into the stream running through plaintiff's lands, thus increasing the flow of water through said stream. There is evidence to sustain this finding by the court.

We have read with care the affidavits introduced as evidence upon the hearing before Judge Harding and from which he made his findings of fact. Upon this appeal we may review the evidence and determine questions of fact as well as of law; *Cameron v. Highway Commission,* 188 N. C., 84. The evidence sustains the findings of fact. All the material facts of which there was evidence are found by the court. There is no error in this respect.

Nor do we find any error of law in the order of the court restraining and enjoining the defendants until the trial of the action. *Rhyne v.*

Mfg. Co., 182 N. C., 489, is determinative of this appeal. We are unable to distinguish the instant case from that case. In both cases, upon the findings of fact, defendants, by diversion of water from its natural flow and by their threats to continue same, are trespassers upon the lands of plaintiff, the trespass being continuous in its nature. In both cases the conduct of defendants constitute a nuisance, entitling plaintiff to an order restraining defendants from continuing such conduct until the trial of the action.

Defendants and their employees are engaged in a private enterprise. The public has no such interest in the operation of defendants' cotton mills as calls for the application of the rule invoked by them that a court of equity will not enjoin an enterprise by which the public will be benefited at the instance of an individual whose injuries may be compensated by damages. It must be conceded that, however much the continued operation of the septic tanks may promote the interest of defendants, they have no right to commit continued trespasses upon the lands of plaintiff or to maintain a nuisance thereon which causes him irreparable damages. The right of plaintiff to use and enjoy his property cannot be destroyed or diminished by the conduct of defendants, who claim no right to continue such conduct, but who insist only that they should not be restrained because their private interests ought to outweigh the rights of plaintiff. Indeed, it does not appear that the operation of the cotton mills will be prevented during the continuance of the restraining order; defendants may accomplish the object of disposing of their sewage by other means. The fact that this may call for the expenditure of large sums of money by defendants cannot be considered as justifying the continuance of a trespass upon or a nuisance to the lands of plaintiff by defendants. As said by *Chief Justice Clark*, in *Rhyne v. Mfg. Co., supra*, "Defendants must attain its ends, advance its interests, or serve its convenience by some method, whether in improving its sewerage system or otherwise, which shall be in accordance with the age-old maxim that a man must use his own property in such a way as not to injure the rights of others, *sic utere tuo, ut alienum non lædas.*"

Since the argument of this case in this Court an affidavit has been filed in the record, accompanied by a letter from counsel for one of defendants, tending to show that plaintiff, Finger, has since said argument conveyed the land described in the complaint to plaintiff, Rhyne. No notice seems to have been given to plaintiffs of this affidavit and no motion has been made in the cause which calls for a consideration of its contents by us. It is no part of the record.

The order made by Judge Harding is sustained. There is

No error.

THE STATE AND CITY OF CHARLOTTE v. E. P. STOWE.

(Filed 24 June, 1925.)

1. Health—Municipal Corporations — Cities and Towns — Cows — Statutes—Police Powers—Constitutional Law—Discrimination.

A municipal corporation is given authority to regulate the keeping of cows within its limits as pertaining to the health of its citizens and within its police powers, and in the reasonable exercise of such powers may prescribe and define a certain area therein wherein cows may not be kept, without violating the organic law against discrimination. C. S., 2787.

2. Same—Courts.

An ordinance to preserve the health of its citizens is largely left to the determination of the municipal authorities, and will not be interfered with by the courts unless it is made manifestly to appear that it is unreasonable and oppressive.

CLARKSON, J., dissenting.

APPEAL by defendant from *Lane, J.*, at February Term, 1925, of MECKLENBURG.

Criminal prosecution tried upon a warrant charging the defendant with keeping cows in certain territory prohibited by ordinance of the city of Charlotte.

From an adverse verdict and judgment that the defendant pay a fine of $25 and the costs, he appeals.

Attorney-General Brummitt and Assistant Attorney-General Nash for State.

McCall, Smith & McCall for defendant.

STACY, C. J. This prosecution was commenced in the recorder's court of the city of Charlotte and tried *de novo* on appeal to the Superior Court of Mecklenburg County. From the latter court the case is brought here to test the validity of a "cow ordinance" of the city of Charlotte, the pertinent provisions of which are as follows:

"Section 1. It shall be unlawful to keep or maintain any cow or cows on any lot within any pen or stable within the corporate limits of the city of Charlotte within a radius of 50 feet of any dwelling," etc. (The remainder of this section deals with the kind of pen or stable to be provided; its validity is conceded and is not in dispute.)

"Section 2. That it shall be unlawful to keep any cow or cows on any lot or premises within the following limits of the city of Charlotte, to wit: Beginning at a point where the Seaboard Air Line Railroad crosses the Southern Railway near West Eleventh Street and runs along

the line of the Southern Railway to the Dowd Road; thence eastwardly from the Dowd Road to Mint Street and thence with a straight line from Mint Street to where the Columbia branch of the Southern Railroad crosses West Park Avenue; thence south with Columbia branch of the Southern Railroad to Tremont Avenue; thence along Tremont Avenue in an eastward direction to Avondale Avenue, continuing a straight line to West Dilworth Road; thence north along Dilworth Road to Rosa Avenue; thence with Rosa Avenue to east Morehead Avenue, near the residence of Lee Folger; thence with a straight line north to the bridge over Sugar Creek on East Fourth Street to Hawthorne Lane; thence north along Hawthorne Lane, continuing a straight line to the Seaboard Air Line Railroad; thence west along the Seaboard Air Line Railroad to the beginning."

The defendant lives in that territory covered by section 2 of the ordinance prohibiting the keeping of any cow or cows within the restricted area, and he contends that this portion of the ordinance is void, first, because it is unreasonable, and, second, because it creates an unlawful discrimination between the citizens living within the boundaries specified in said section and those who live in other parts of the city, but outside of the limits mentioned therein.

It is conceded that the right to pass regulatory ordinances with respect to keeping horses, cattle, sheep, swine, goats, dogs, and other animals in the city of Charlotte is specifically granted both by charter provision (Priv. Laws 1915, ch. 276, sec. 14) and by the general law. The pertinent provisions of C. S., 2787, dealing with the general powers of municipal corporations are as follows:

"6. To supervise, regulate, or suppress, in the interest of public morals, public recreations, amusements and entertainments, and to define, prohibit, abate, or suppress all things detrimental to the health, morals, comfort, safety, convenience, and welfare of the people, and all nuisances and causes thereof.

"7. To pass such ordinances as are expedient for maintaining and promoting the peace, good government, and welfare of the city and the morals and happiness of its citizens, and for the performance of all municipal functions.

"10. To make and enforce local police, sanitary, and other regulations."

Under the above grant of powers, we think the ordinance in question is valid. *S. v. Rice,* 158 N. C., 635; *S. v. Weddington,* 188 N. C., 643; *Lawrence v. Nissen,* 173 N. C., 359; *Ex parte Broussard,* 74 Tex. Cr., 333, Ann. Cas., 1917 E, 919, and note.

In the exercise of an unquestioned police power much must necessarily be left to the discretion of the municipal authorities, and their

acts will not be judicially interfered with, unless they are manifestly unreasonable and oppressive. Dillon's Mun. Corp., sec. 379; *McLean v. Kansas,* 211 U. S., 539; *Dobbins v. Los Angeles,* 195 U. S., 223; *S. v. Kirkpatrick,* 179 N. C., 747; *S. v. Shannonhouse,* 166 N. C., 241; *S. v. Lawing,* 164 N. C., 492; *S. v. Johnson,* 114 N. C., 846.

The fact that the ordinance in question prohibits the keeping of cows within certain defined limits of the city and permits them to be kept under specified restrictions in the remainder of the corporate territory is not *per se* an unreasonable regulation. It is presumed to be otherwise. *Ex parte Glass,* 49 Tex. Cr., 87; *Soon Hing v. Crowley,* 113 U. S., 703; *Barbier v. Connolly,* 113 U. S., 27; *In re Linehan,* 13 Pac. (Cal.), 170; *S. v. Rice, supra,* reported in 39 L. R. A. (N. S.), 266, and note; *Darlington v. Ward,* 48 S. C., 570, reported in 38 L. R. A., 326, and note; 1 R. C. L., 1161.

There is nothing appearing on the present record which would warrant us in declaring the ordinance void for unreasonableness or unlawful discrimination. *Lawrence v. Nissen, supra; S. v. Hord,* 122 N. C., 1092. The verdict and judgment must be upheld.

No error.

CLARKSON, J., dissenting: It is with regret that I cannot agree with the majority opinion. I do not think, as a matter of law, that the governing body of the city of Charlotte, consisting of three, a majority of two, however patriotic and efficient they may be, under the decisions of this Court or any other court in the United States until the present decision, can draw any kind of zig-zag or crooked line, in their discretion, in the city, and prohibit the keeping of a cow in the area and put one of its citizens to work on the roads of the county for keeping a cow. There is no dispute that a valid ordinance can be made to regulate the keeping of a cow. This is done in section 1 of the ordinance, and is applicable to all the citizens of the city alike. The Legislature has given this specific power to regulate. C. S., 2787, sec. 14; Private Laws 1915, ch. 276, sec. 57, subsec. 14, consolidated charter of the city of Charlotte, same power to regulate as C. S., 2787. In fact, the charter provides as follows, subsec. 10, *supra:* "To provide for inspection of all dairies inside and outside of the city limits doing business within the city and to regulate and maintain a standard for milk sold in the city; to provide for and regulate the inspection of all foodstuffs offered for sale in the city of Charlotte and to impose license fees on all persons engaged in any of said business." The charter even permitting the regulation of dairies in the city, how can it be construed to prohibit keeping a cow? The creature, the city, surely cannot have more power than the creator, the Legislature, that gave the power. The city has no power except that given by the legislative act.

But section 2 of the city ordinance prohibits absolutely the keeping a cow in the zig-zag district. There is no authority in the Constitution or law of this land, in my opinion, for such unreasonable, arbitrary, discriminatory, and autocratic power, and the ordinance, section 2, is unconstitutional and void. In this age, drifting toward "nervous particularity," we are forgetting the fundamental rights of a citizen. The evidence in the record is that one man drew the ordinance. All the evidence is that defendant kept his place clean. His neighbors testified that he kept the stables clean and there was no complaint, nothing offensive. The health officer had no complaint, nothing offensive. The defendant kept the two cows 14 years, and there was no complaint. He has a big lot. The sooner we call a halt, the better, and go back to everyday common-sense. From a thorough search, I can find no precedent in this nation that says so useful an animal as a cow can be absolutely prohibited. They can be regulated. In France, Germany, and many other countries a cow is so useful to a family that they are often kept under the same roof and carefully fed and cared for—the milk being so nourishing and useful as food, especially for children.

1 R. C. L., p. 1160, part sec. 104, dealing with this subject, says: "Under the general grant of legislative power to declare what shall constitute a nuisance, and to prevent, abate, and remove the same, some municipalities have enacted ordinances expressly prohibiting the keeping anywhere within the corporate limits or, where the power has been conferred, within a stated distance beyond, of such animals as, from their known habits or mode of life, are deemed particularly offensive or detrimental to public health. Notorious among these which may thus be said to have been branded by municipal or legislative declaration as nuisances *per se* may be mentioned the hog and the jackass. Such enactments providing for the complete and absolute banishment of the prescribed animals from the corporate limits appears to have been sustained as a legitimate and proper exercise of the police power."

In *Mugler v. Kansas*, 123 U. S., p. 623, *Mr. Justice Harlan*, writing the opinion, says, at p. 661: "Under our system, that power is lodged with the legislative branch of the government. It belongs to that department to exert what are known as the police powers of the State, and to determine primarily what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety. . . . The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under a solemn duty—to look at the substance of things whenever they enter upon the inquiry whether the Legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted

to protect the public health, the public morals, or the public safety has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge and thereby give effect to the Constitution. Keeping in view these principles, as governing the relations of the judicial and legislative departments of government with each other, it is difficult to perceive any ground for the judiciary to declare that the prohibition by Kansas of the manufacture or sale within her limits of intoxicating liquors for general use there as a beverage is not fairly adapted to the end of protecting the community against the evils which confessedly result from the excessive use of ardent spirits. There is no justification for holding that the State, under the guise merely of police regulations, is here aiming to deprive the citizen of his constitutional rights, for we cannot shut out of view the fact, within the knowledge of all, that the public health, the public morals, and the public safety, may be endangered by the general use of intoxicating drinks, nor the fact, established by statistics accessible to every one, that the idleness, disorder, pauperism, and crime existing in the country are, in some degree at least, traceable to this evil."

In *R. R. v. City of Goldsboro,* 232 U. S., p. 558, *Mr. Justice Pitney,* affirming the decision of this Court (155 N. C., p. 356), says, at p. 558: "For it is settled that neither the 'contract' clause nor the 'due process' clause has the effect of overruling the power of the State to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant; and that all contract and property rights are held subject to its fair exercise. *Slaughter-house cases,* 16 Wall., 36, 62; *Munn v. Illinois,* 94 U. S., 113, 125; *Beer Co. v. Massachusetts,* 97 U. S., 25, 33; *Mugler v. Kansas,* 123 U. S., 623, 665; *Crowley v. Christenson,* 137 U. S., 86, 89; *New York, etc., R. R. Co. v. Bristol,* 151 U. S., 556, 567; *Texas, etc., R. R. Co. v. Miller,* 221 U. S., 408, 414, 415."

In the *Mugler case, supra,* the sale of liquor was an evil in itself—*per se.* What evil *per se* is there in a cow? The cow can be kept, under regulations, as clean as any animal.

The decision in the *Goldsboro case, supra,* was a regulation as to limiting speed of trains, etc., in Goldsboro.

The only suggestion in the present case that a cow should be prohibited is in the brief of the Attorney-General: "To keep a cow in a thickly settled residential district is to invite the presence of numerous flies, which are regarded now as carriers of disease."

Writing for the Court, in *Storm v. Wrightsville Beach,* 189 N. C., p. 682, it was said: "An incinerator for the destruction of garbage in a town, of all things, especially a town on a beach that functions mostly in the summer, is a necessary expense. It eliminates the odor that comes from filth and is a great health precaution. It destroys the breeding-place of flies—annoying, to say the least, to man and beast. It is a medical fact that flies breed so rapidly that in a short period their increase is enormous. Of course, they die, but they must have filth to breed on and food to live on. The breeding places must be eliminated; if not, from these places of filth they come into the habitation of man (hence the growth in screening) and pollute and poison food and drink. To this army of little marauders the medical fraternity claim that, in consequence of this filth and disease-carrying fly, not only the strong, but the weak, and especially children, are liable to, in common parlance, 'catch' such diseases as typhoid fever, dysentery, diarrhœa of infants, etc. The old saying is, 'Cleanliness is, indeed, next to Godliness.' Many cities and towns in the State have erected incinerators and taken it for granted that this court would hold they were a necessary expense. The idea is as old as the Mosaic law."

The municipality can regulate keeping the cow, as in section 1 of the ordinance—screen the pen or stable and make the place free from flies as the ordinary kitchen of the average citizen; regulate so as to destroy the breeding place of flies. Don't destroy or prohibit the most useful animal in the world.

From Agricultural Extension Service Circular No. 107, distributed in furtherance of the acts of Congress and North Carolina Agricultural Extension Service, August, 1920, I quote the great value of milk: "Milk and its products represent at the present time about 20 per cent of our entire diet. These foods supply fat that promotes growth, proteins of exceptional quality, carbohydrates equal and possibly superior to those of other foods, ideal mineral matter, and the vitamines that are so essential to growth, health, and vigor. Milk is a perfect and complete food. *It is nature's greatest food product and our best qualified authors tell us that it should form over 40 per cent of our diet.* (Italics mine.) In North Carolina this is impossible, with the present number of dairy cows and the methods under which they are handled."

Dr. W. S. Rankin, State Health Officer, says: "Failure to use milk in sufficient quantity and of pure quality with infancy and early childhood is, in all probability, the greatest sin that parents commit against their children. Upon an adequate milk supply the future of the child and the race is dependent more perhaps than on any other single factor." Dr. McCollum, of Johns Hopkins University, says: "The people who have achieved, who have become large, strong, vigorous people, who

have reduced their infant mortality, who have the best trades in the world, who have an appreciation of art, literature and music, and who are progressive in science, and in every activity of the human intellect, are the people who have used milk and its products liberally." Cow Facts, Folder No. 5, North Carolina Agricultural Extension Service.

Physicians, as well as common-sense, tell us that if the body is kept fit by nutritious food, milk, nature's greatest food product, that the fly or any other germ carrier is not so apt to inoculate with poison. A healthy body absorbs or throws off the poison. It is the weak and undernourished that are more liable to be infected. A cow to a family is one of the cheapest and greatest blessings.

The North Carolina Department of Agriculture says: "According to Mr. Arey, our dairy specialist, the average milch cow in North Carolina gives ten pounds of milk per day on a basis of three hundred milking days per year, or 3,000 pounds per year. . . . The average value of a cow in North Carolina is $50, and the average value of her products per year is $87."

It is a matter of common knowledge that great effort is now being made in breeding fine milch cows—Guernsey, Holstein, and especially Jersey cattle—in this commonwealth for the nourishing food—milk.

In the majority opinion, no specific authority by the Legislature is cited, if one could be given under the police power, to the city of Charlotte to prohibit the keeping of a cow. The right is given to regulate. The only authority is one guessed at as included in C. S., 2787:

"(6) To supervise, regulate, or suppress, in the interest of public morals, public recreations, amusements and entertainments, and to define, prohibit, abate, or suppress all things detrimental to the health, morals, comfort, safety, convenience, and welfare of the people, and all nuisances and causes thereof.

"(7) To pass such ordinances as are expedient for maintaining and promoting the peace, good government, and welfare of the city, and the morals and happiness of its citizens, and for the performance of all municipal functions.

"(10) To make and enforce local police, sanitary, and other regulations."

The charter of the city, especially by implication, gives the right to even keep dairies under regulations, *supra.*

The majority opinion says, "Under the above grant of powers, we think the ordinance in question is valid," and cites three North Carolina opinions:

(1) *S. v. Rice*, 158 N. C., p. 635, holding the ordinance valid, keeping any hogs or pigs within the corporate limits. Two of the judges dissented.

(2) *Lawrence v. Nissen,* 173 N. C., p. 359, An ordinance prohibiting a hospital to be built within 100 feet of a residence was held valid. Two of the judges dissented.

(3) In *S. v. Weddington,* 188 N. C., 643, was a Sunday ordinance held valid, as follows: "That it shall be unlawful for any person or persons, merchants, tradesmen, or company to sell or offer for sale on Sunday any goods, wares, drinks or merchandise of any kind or character, except in case of sickness or absolute necessity, in the town of Faith."

This is a different class of ordinance than the one under consideration. The Sunday ordinance is predicated on the idea that there should be a rest day for man. The forbidding keeping open stores gives the rest and applies to all in the town alike.

The majority opinion also cites in *Ex parte Broussard,* 74 Tex. Cr., 333, Anno. Cas., 1917E, 919, and note. The *Texas case* was an ordinance allowing the keeping of not more than six head of cattle (cows in the case) within 300 feet of a private residence; "a permit must be obtained from the City Council." This was a regulation, not a prohibition. It is cited in Anno. Cas., *supra.* In the authority cited, the "and note" referred to "validity of ordinance regulating keeping of cattle within municipal limits." In Anno. Cas., 1917E, p. 929, the principle is laid down as follows:

"General Rule. It is generally held that an ordinance regulating the keeping of cattle within municipal limits is a valid exercise of the police power delegated to a municipality when the ordinance in question is not unreasonable or arbitrary," citing a wealth of authorities. The Anno. Cas. is cited in the majority opinion, and this is all I contend for. You can regulate, not prohibit. In no case in the "and note" is there any decision prohibiting the keeping of a cow.

The majority opinion does not cite *S. v. Bass,* 171 N. C., p. 784, exactly in point, which declares a livery stable not a nuisance *per se.* Only one dissent to this opinion. That case, written by *Brown, J.,* lays down this sound doctrine applicable here: "An ordinance to be valid must be uniform in its application to all citizens and afford equal protection to all alike. It must not discriminate in favor of one person or class of persons over others. To be valid it must furnish a uniform rule of action. *S. v. Tenant,* 110 N. C., 612. It must operate equally upon all persons, as well as for their equal benefit and protection, who come or live within the corporate limits. 1 Dillon Mun. Corp., sec. 380; *S. v. Pendergrass,* 106 N. C., 664; *S. v. Summerfield,* 107 N. C., 898."

If a livery stable is not a nuisance *per se* and cannot be prohibited, and they are in all the towns and cities of the State, as are horses, dogs, etc.—all will attract flies, the only ground on which the cow is to

be prohibited—why is not a livery stable, a dog, a horse, chickens, a nuisance? Why should they not all go? Of course, common-sense, as well as law, says you can regulate, but here is a prohibition. The tax on a little tea without representation, which brought on the "Declaration of Independence," is not so weighty a matter as to absolutely prohibit, not regulate, a cow in a municipality—which produces life-giving food, milk, for a family. The municipality destroys the use of the property under the guise of police power. Most of the decisions cited in the majority opinion deals with regulation, which is not disputed, but prohibition of a cow is what I cannot agree on. There can be found no opinion in any State in the United States or by the Supreme Court of the United States, except this present opinion, that prohibits, not regulates, the keeping of a cow in a municipality. Such an unreasonable and arbitrary ordinance under our system of government should not be permitted.

The able and learned counsel for the defendant well says: "We know that by a subtle process of reasoning the courts have generally found grounds to uphold ordinances passed by municipalities, although they impugned upon the rights and liberties of the people, but it's time a well-defined line of demarcation was being drawn beyond which law-making bodies cannot go in quest of liberties to be restrained and regulated. The old adage that 'every citizen of this republic is entitled to equal protection of the law and to enjoy the benefits of *equal laws,*' has been relegated to the ever-increasing scrap-pile of civil liberties abolished by arbitrary law-making bodies. The defendant had all his life been a respected and law-abiding citizen of the city of Charlotte, and had, up to 10 June, 1924, kept his two milch cows in accordance with laws which had been in existence 'from the time whereof the memory of man runneth not to the contrary.' "

CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

FALL TERM, 1925

J. TERRY WEST, ANDRE P. PILLOT, CHESTER S. FAIRGRIEVE, AND WILLIAM J. BUTLER, TRADING AS C. E. WELLES & CO., v. W. T. SATTERFIELD.

(Filed 16 September, 1925.)

1. Contracts—Futures—Wagering Contracts—Parol Evidence—Statutes.

Our statutes rendering void and unenforceable in our courts a contract for the sale of futures upon margin covered by the purchaser, that does not contemplate the delivery of the thing bargained for, but only a payment to be made for a loss incurred or a profit to be received in accordance with the fall or rise of the market, looks to the substance of the contract and not to its form, and parol evidence is competent to show the intention of the parties entering therein. C. S., 2144.

2. Same—Evidence—Prima Facie Case—Burden of Proof—Instructions.

As to whether a contract for the sale of shares of stock was intended by the parties to be upon speculation, in violation of C. S., 2144, or contemplated the actual delivery of the shares contracted to be sold, the defendant in the action, the purchaser, makes out a *prima facie* case upon evidence that it was founded upon a gambling or wagering consideration in violation of the statute, C. S., 2145, and thereupon the burden of proof to show to the contrary rests upon the plaintiff, and upon conflicting evidence becomes a question for the jury under proper instructions from the court. C. S., 2146.

3. Evidence—Contracts—Futures—Appeal and Error.

Testimony of a witness as to what facts constitute a marginal payment under the terms of a contract in violation of our statute is unobjectionable when correctly stating the law.

APPEAL by plaintiffs from *Bond, J.*, and a jury, at March Term, 1925, of CHOWAN.

This is a civil action brought by plaintiffs, stockbrokers, at 71 Broadway, New York, members of the New York Stock Exchange. On 30 April, 1922, defendant wrote plaintiffs the following letter from Edenton, N. C.:

"I received your letter of 25 April stating that you would recommend International Nickel. Please buy 100 shares of it at market and send me your invoice. I will forward you check for the marginal requirement."

In compliance with the letter, plaintiffs purchased International Nickel (I. K.), 100 shares, from Block, Maloney & Co., 74 Broadway, at 18.75 per share. Defendant, on 11 May, 1922, wrote plaintiffs the following letter:

"I received a letter from you stating you would like to have some money on my account, but you did not state how much. Please advise me at once."

Plaintiffs, on 15 May, 1922, wrote defendant:

"Replying to your letter of 11 May, kindly forward $750 to cover the margin on your account."

On 26 January, 1923, plaintiffs closed out the "International Nickel" at 14.87½ a share, and sued defendant for difference, including commissions and interest—$498.14.

Plaintiffs' evidence was to the effect that they advanced their own funds for the purchase, and that "said stock was immediately delivered to C. E. Welles & Co., and payment therefor made by them through the Stock Clearing Corporation in accordance with the rules of the New York Stock Exchange. . . . That payment for said stock was made by the plaintiffs on 3 May, 1922, and charged to defendant's account. That said stock was immediately delivered to the plaintiffs as defendant's brokers, and that they held said stock as security for defendant's account."

The plaintiffs in their complaint allege that they "made repeated demands upon defendant for the payment of margin on his account, which payment defendant wrongfully failed and neglected to make, whereupon plaintiffs notified the defendant that unless he made payment of margin they would take steps to close out the account and collect from him any loss."

Defendant in his answer says: "The defendant admits the plaintiffs demanded payment of 'margin,' and that the same was refused, this defendant contending he has never entered into a legal contract with the plaintiffs and owes them nothing."

The defendant, for a further answer, says, in part: "That the alleged contract, this defendant is advised and so avers the fact to be, is contrary to public policy and the statute law of the State of North Carolina,

and this defendant pleads C. S., ch. 39, entitled 'Gaming Contracts and Futures,' in bar of plaintiffs' right to recover in this action."

Defendant testified that he was in the insurance business at Edenton and never been engaged in the nickel business. After receiving plaintiffs' circular letter about International Nickel stock, he gave them order as contained in letter.

Plaintiffs in apt time duly excepted and assigned error to the following questions and answers of the defendant:

"Q. Did you expect to get the stock delivered unless you paid for it? A. No, sir. I did not buy the stock to be delivered; I bought it on marginal account. It means hedging the stock. They asked me for $500. Because I did not know whether I was going to get it or not, I would not send it.

"Question by judge: If you had sent them the money for the stock, did you expect them to send the stock to you? A. No. On a marginal basis they could not.

"Question by judge: They have got your order to buy 100 shares. Suppose they had written to you on the date you sent it in, would you expect a delivery of the stock? A. No, sir; I didn't know anything about it. It was a gambling proposition and I would not send check for it. I would not have expected anything from them.

"Q. What is the meaning, so far as this expression of 'marginal' requirements goes? A. It is known as a gambling contract. Stock goes up or down; you get whatever the margin is; you rise up or go down; lose according to the fluctuation of the market."

On recross-examination, defendant said: "Margin is what they call so many points on the stock. If you buy over the purchase price, that is the margin."

"The burden is on the plaintiff to show that it was a legal contract. We have the evidence of only one. Satterfield comes in and files answer claiming it was a gambling contract; that it is upon the plaintiff to show that the contract was not a gambling contract. In other words, that the stock was actually to be delivered up to the defendant, Satterfield. . . . If you accept the other version and find it was a gambling contract, that both parties knew it would not be delivered to Satterfield, in that event your answer shall be 'Nothing.' . . . A gambling bargain is by the purchase of stock by parties knowing that the stock is to be held by them."

To the above charge exceptions and assignments of error were made.

The court below charged the jury further as follows:

"If both parties knew that stock was never to be delivered to Satterfield, then the law says the contract was not a valid contract, and there can be no recovery. If, on the other hand, the stock was bought to be

delivered to Satterfield, and actual delivery was intended, it was a valid contract, or if Satterfield had a right to know the contract existed upon actual delivery, that would make it a valid contract and keep it from being a gambling contract, because a gambling bargain is by the purchase of stock by parties knowing that the stock is to be held by them. . . . The question at issue is: Is Satterfield indebted to plaintiff; if so, in what amount? If you find in favor of plaintiff, C. E. Welles & Co., the amount due is $498.14, with interest on same from 29 January, 1923. If you accept the other version and find it a gambling contract, that both parties knew it would not be delivered to Satterfield, in that event your answer shall be 'Nothing.'"

The issue and answer is as follows:

"Is defendant, Satterfield, indebted to plaintiffs, and, if so, in what amount? A. Nothing."

There was a verdict for the defendant and judgment rendered accordingly. Exceptions and assignments were duly made to evidence and charge, as before stated, and appeal taken to the Supreme Court.

W. D. Pruden for plaintiffs.
Herbert R. Leary for defendant.

CLARKSON, J. Defendant repudiates his promise made to plaintiffs and sets up the defense "that the alleged contract . . . is contrary to public policy and the statute law of the State of North Carolina, and this defendant pleads C. S., ch. 39, entitled 'Gaming Contracts and Futures,' in bar of plaintiffs' right to recover in this action."

This brings us to consider the statute law on the subject. This is a matter of considerable importance to commercial transactions, and, notwithstanding their length, we give the statutes on the subject:

"C. S., 2144. *Certain contracts as to 'futures' void.* Every contract, whether in writing or not, whereby any person shall agree to sell and deliver any cotton, Indian corn, wheat, rye, oats, tobacco, meal, lard, bacon, salt pork, salt fish, beef, cattle, sugar, coffee, stocks, bonds, and choses in action, at a place and at a time specified and agreed upon therein, to any other person, whether the person to whom such articles is so agreed to be sold and delivered shall be a party to such contract or not, when, in fact, and notwithstanding the terms expressed of such contract, it is not intended by the parties thereto that the articles or things so agreed to be sold and delivered shall be actually delivered, or the value thereof paid, but it is intended and understood by them that money or other thing of value shall be paid to the one party by the other, or a third party, the party to whom such payment of money or other thing of value shall be made to depend, and the amount of such money or other thing of value so to be paid to depend upon

whether the market price or value of the article so agreed to be sold and delivered is greater or less at the time and place so specified than the price stipulated to be paid and received for the articles so to be sold and delivered, and every contract commonly called 'futures,' as to the several articles and things hereinbefore specified, or any of them, by whatever other name called, and every contract as to the said several articles and things, or any of them, whereby the parties thereto contemplate and intend no real transaction as to the article or thing agreed to be delivered, but only the payment of a sum of money or other thing of value, such payment and the amount thereof and the person to whom the same is to be paid to depend on whether or not the market price or value is greater or less than the price so agreed to be paid for the said article or thing at the time and place specified in such contract, shall be utterly null and void; and no action shall be maintained in any court to enforce any such contract, whether the same was made in or out of the State, or partly in and partly out of this State, and whether made by the parties thereto by themselves or by or through their agents, immediately or mediately; nor shall any party to any such contract, or any agent of any such party, directly or remotely connected with any such contract in any way whatever, have or maintain any action or cause of action on account of any money or other thing of value paid or advanced or hypothecated by him or them in connection with or on account of such contract and agency; nor shall the courts of this State have any jurisdiction to entertain any suit or action brought upon a judgment based upon any such contract. This section shall not be construed so as to apply to any person, firm, corporation, or his or their agent engaged in the business of manufacturing or wholesale merchandising in the purchase or sale of the necessary commodities required in the ordinary course of their business."

"C. S., 2145. *Prima facie evidence of illegal contract in 'futures.'* Proof that anything of value agreed to be sold and delivered was not actually delivered at the time of making the agreement to sell and deliver, and that one of the parties to such agreement deposited or secured, or agreed to deposit or secure, what are commonly called 'margins,' shall constitute *prima facie* evidence of a contract declared void by the preceding section."

"C. S., 2146. *Burden shifted by plea of illegality; pleadings not evidence in criminal action.* When the defendant in any action pending in any court shall allege specifically in his answer that the cause of action alleged in the complaint is in fact founded upon a contract such as is by this chapter made void, and such answer shall be verified, then the burden shall be upon the plaintiff in such action to prove by the proper evidence, other than any written evidence thereof, that the contract sued

upon is a lawful one in its nature and purposes; and the defendant may likewise produce evidence to prove the contrary: *Provided, nevertheless,* that any allegation or statement of fact made in any pleading in any such action, or the evidence produced on the trial in any such action, shall not be evidence against the party making or producing the same in any criminal action against such party."

Plaintiffs' group of assignments of error in regard to the meaning of "marginal requirements," etc., cannot be sustained. It appears from the complaint of plaintiffs, "whereupon plaintiffs notified the defendant that unless he made payment of *margin* they would take steps to close out the account and collect from him any loss," etc.

From the complaint, answer, and letters of both parties, it appears that defendant was to put up "margin." It was clearly permissible for either party to define the meaning. In fact, plaintiffs, on cross-examination, asked defendant the meaning.

Cyc. Law Dictionary, under the head of "margin," says see "gambling contracts," and under such head defines "margin": "Money or collaterals deposited with a broker to protect contracts, usually for future delivery."

The evidence given by defendant in his definition of "margin" could in no way be prejudicial, as it is substantially the definition given by the courts. "A payment made on account by a customer to a stockbroker, under an agreement between the customer and the stockbroker in which the stockbroker agreed either to sell or to buy from the customer a certain number of shares of stock, but under which, in fact, no delivery or transfer of shares was contemplated, is known in stockbrokers' parlance as a 'margin.'" *McClain v. Fleshman* (U. S.), 106 Fed., 880, 882. C. S., 2145, *supra.*

In an action by the purchasers of potatoes by contract providing they should stand any shrinkage while in storage for future delivery, the goods being warranted sound and No. 1 at the time of making the contract, question whether the potatoes were up to specifications, also the meaning of the terms "shrinkage to be stood by the purchaser," held for the jury, the terms being sufficiently ambiguous to permit explanation by parol. *Richardson v. Woodruff,* 178 N. C., 46.

We think the evidence objected to was competent. The charge of the court as to the burden was in accordance with the statute and as to what was and what was not a valid contract, a correct interpretation of the law as plainly written by the lawmaking power of the State. This position is fully sustained by our decisions. *Burns v. Tomlinson,* 147 N. C., 634; *Randolph v. Heath,* 171 N. C., 383.

In *Edgerton v. Edgerton,* 153 N. C., 169, it was said: "The form of the contract is not conclusive in determining its validity when it is

assailed as being founded upon an illegal consideration and as having been made in contravention of public policy. If under the guise of a contract of sale, the real intent of the parties is merely to speculate in the rise or fall of the price and the property is not to be delivered, but only money is to be paid by the party who loses in the venture, it is a gaming contract and void. 'The true test of the validity of a contract for future delivery is whether it can be settled only in money and in no other way, or whether the party selling can tender and compel acceptance of the particular commodity sold or the party buying can compel the delivery of the commodity purchased. The essential inquiry in every case is as to the necessary effect of the contract and the real intention of the parties,'" citing 20 Cyc., 930; *Williams v. Carr*, 80 N. C., 295; *S. v. McGinnis*, 138 N. C., 724; *S. v. Clayton, ibid.*, 732.

Walker, J., in *Orvis v. Holt*, 173 N. C., 234, said: "In this case, was it the intention of both parties that the cotton should not be delivered, or was it their purpose to conceal, in the deceptive terms of a fair and lawful contract of sale, a gambling deal or transaction, by which they contemplated no real bargain as to the article agreed to be delivered? If so, the contract is void. *Holt v. Wellons*, 163 N. C., 124. We said in that case: 'Of course, the law deals only with realities and not appearances—the substance and not the shadow. It will not be misled by a mere pretense, but strips a transaction of its artificial disguise in order to reveal its true character. It goes beneath the false and deceitful presentment to discover what the parties actually intended and agreed, knowing that "the knave counterfeits well—a good knave." It always rejects the ostensible for the real in looking for fraud or a violation of law. The essential inquiry, therefore, in every case is as to the necessary effect of the contract and its true purpose.'"

The statute in this State makes contracts for "futures" utterly null and void. The statute clearly defines what are "future" contracts: "Whereby the parties thereto contemplate and intend no real transaction as to the article or thing agreed to be delivered."

The Legislature in its wisdom has seen fit to pass a drastic act to stop this kind of gambling or vicious contracts, no doubt fully aware of the wreckage to the human family. The mischief the act is intended to prevent is plain—that no one should get something for nothing, or nothing for something. The defendant repudiates his promise and relies upon the law—this he has a legal right to do. In fact, the statute makes such transactions, under C. S., 2147, a misdemeanor. Under C. S., 2148, opening offices for sales of "futures" (bucketshop) is also made a misdemeanor. *S. v. McGinnis*, 138 N. C., 724.

On the record we find

No error.

STATE EX REL C. S. O'NEAL, J. H. SWINDELL, O. B. GIBBS AND C. F. GIBBS v. T. H. JENNETTE, R. D. HARRIS AND L. B. WATSON.

(Filed 16 September, 1925.)

1. Counties—Government—Principal and Agent.

Counties are governmental agencies of the State, and where there is no constitutional inhibition, are subject to the unlimited control of the Legislature as to the manner of their exercising their proper functions or the selection of agencies therein to be employed for the purpose.

2. Same—Statutes—Legislative Powers—Vested Rights.

The commissioners of a county duly elected and inducted have no vested right in their offices, and the same may be abolished by statute, and other instrumentalities for the administration of the county government substituted therefor, when not inhibited by our Constitution.

3. Same—Constitutional Law.

Where a county has been given the full general authority for levying taxes and pledging the faith and credit of the county under our Constitution, the Legislature has the power and authority to change the agencies by which the proper execution of this power shall be exercised without further observing the constitutional requirement that a statute of this character shall be passed upon its various readings in each branch of the Legislature upon a roll-call requiring the recording of the "aye" and "no" vote of the members, etc. Const., Art. II, sec. 14.

APPEAL by defendants from a judgment of *Bond, J.*, 17 August, 1925, overruling a demurrer to the complaint. From HYDE.

The plaintiffs alleged that in the general election of 1924 they and the defendant Watson had been elected commissioners of Hyde County and, having duly qualified as such, were performing their official duties at the institution of the action; that the General Assembly at the session of 1925 attempted to abolish the board of county commissioners of Hyde County and to provide in lieu thereof a board of managers for the county; that said act, among other things, attempted to vest in the board of managers all authority, responsibilities, and liabilities which had been held and assumed by the board of county commissioners of Hyde County, among which were the levying of taxes and the pledging of the credit of the county for the necessary expenses thereof; that the said law had not been read three separate times, on separate days, in each house of the General Assembly, and the said board of county managers, even though it be lawfully constituted in other respects, is without authority to levy taxes for county purposes or to pledge the credit of the county, if the same should be necessary in the management and control of the county government; that the act is contrary to the Constitution of North Carolina in that it attempts to abolish the office of county commissioners, which is a constitutional office, and to

establish in place thereof a board of managers for the county; that the defendants have attempted to qualify as such board of managers and to usurp the rights and responsibilities of the plaintiffs and have assumed to conduct the public business of the county; that they intend also to levy taxes for the fiscal year 1925-'26 at the times fixed by law for such purpose, and, if necessary or expedient, to pledge the credit of the county for the government thereof, which, being contrary to law and in breach of plaintiffs' rights, will result in confusion; and, finally, that the action is prosecuted with the consent of the Attorney-General. The plaintiffs pray that they be declared the duly constituted board of commissioners and entitled to perform the duties of their office; that the defendants be declared not to be the board of managers and that they be enjoined from acting as such and from interfering with the plaintiffs' control of the affairs of the county.

The defendants demurred to the complaint on the following grounds:

(1) The act referred to in section 2 of the complaint was duly and regularly passed in accordance with the Constitution of the State of North Carolina, and that it is not such an act as comes within the provision of Article II, sec. 14, of the Constitution of North Carolina.

(2) That the control and management of the county officers, the number of members of the governing board and their duties, with respect to county management, are within the control of the Legislature, and that the Legislature is at liberty to abolish, create, modify, or enlarge their duties at any time, and that it is within the province of the Legislature to determine whether a county shall be managed by a board of managers or a board of commissioners; that it is within the province of the Legislature to determine what duties shall be performed by each member of said board or commission and the term of office that each shall serve.

(3) That at the time of the institution of this action no taxes had been levied, nor any indebtedness created, and that the State of North Carolina, acting through its Legislature, has full power and authority to determine the manner of government of its political subdivisions.

(4) That there is now no such office as county commissioners in the county of Hyde and no office to which the plaintiffs could be inducted.

The demurrer was overruled and the defendants excepted and appealed.

Sections 1 and 2 of the act in question (ch. 516, Public-Local Laws of 1925) are as follows:

"Section 1. That the board of commissioners of Hyde County is hereby abolished, effective 15 March, 1925, and the term of office of each member of said board as it is now constituted shall expire on said date.

"Sec. 2. There is hereby created a board of managers for the county of Hyde to be composed of three members, hereinafter named, who shall qualify in the same manner that members of the board of commissioners are by law required to qualify, who are hereby invested with all the rights, powers, authorities, and duties conferred by law upon the boards of county commissioners of the several counties of the State, and which may hereafter be conferred by laws which may be enacted. Said board of managers are likewise charged with all liabilities and duties now imposed upon county commissioners, and shall perform all duties prescribed by law, and shall act and serve in lieu of the board of county commissioners to whose duties and liabilities it shall succeed. In addition to the powers and duties now prescribed by law, the said board of managers is hereby authorized and empowered to appoint a county manager, who may be a member of said board of county managers, with such duties and to serve under such rules and regulations as the board may prescribe.

"The said county manager may serve as tax supervisor, or in such other capacity as the board of managers may designate, and he is hereby authorized to audit the affairs of the county and to do and perform any and all other acts that pertain to county government as the board may direct. The compensation of the county manager shall be fixed by the board of county managers, and shall be paid out of the general county funds in monthly payments."

Section 3 provides that all officers of Hyde County shall make reports to the board of county managers as often as they may be directed to do so, to submit records and furnish all information requested by the managers, who are empowered to audit the accounts of the county officers.

Section 4 appoints the defendants a board of managers to serve for terms of two, four and six years, respectively, and provides that every two years one member of the board be elected for a term of six years, the defendants to qualify on 15 March, 1925, and provides also for filling vacancies in the office.

Section 5 repeals all conflicting clauses.

The act was not passed in compliance with Article II, sec. 14, of the Constitution.

W. L. Spencer, S. S. Mann, and H. C. Carter for plaintiffs.
Small, MacLean & Rodman and Carroll B. Spencer for defendants.

ADAMS, J. Counties are civil and political divisions of the State created and organized for the more convenient administration of government, and are invested with such powers as are essential to the welfare and protection of the public within their boundaries. They are not

regarded as municipal corporations in the strict legal sense (although referred to under this title in Article VII of the Constitution), but as instrumentalities of the State; and in the exercise of ordinary governmental functions they are subject practically to the unlimited control of the Legislature, unless restricted by constitutional provision. *Mills v. Williams,* 33 N. C., 558; *White v. Comrs.,* 90 N. C., 437; *Comrs. v. Comrs.,* 95 N. C., 190; *Comrs. v. Comrs.,* 157 N. C., 515.

With respect to the institutions and finances of a county, Article VII has the following provisions:

Section 1. In each county there shall be elected biennially by the qualified voters thereof, as provided for the election of members of the General Assembly, the following officers: a treasurer, register of deeds, surveyor and five commissioners.

Sec. 2. It shall be the duty of the commissioners to exercise a general supervision and control of the penal and charitable institutions, schools, roads, bridges, levying of taxes and finances of the county, as may be prescribed by law. The register of deeds shall be, ex-officio, clerk of the board of commissioners.

Sec. 14. The General Assembly shall have full power by statute to modify, change, or abrogate any and all of the provisions of this article, and substitute others in their place, except sections 7, 9, and 13.

Instances in which the legislative power defined in section 14 has been exercised appear in many of our decisions, among which are the following: *Harriss v. Wright,* 121 N. C., 172; *Audit Co. v. McKenzie,* 147 N. C., 462; *Trustees v. Webb,* 155 N. C., 379; *Comrs. v. Comrs.,* 165 N. C., 632; *Woodall v. Highway Com.,* 176 N. C., 377.

It is settled by the decisions as well as the cited sections of the Constitution that the plaintiffs had no vested property or contract right to the office to which they had been elected of which they could not be deprived by the Legislature. *Mial v. Ellington,* 134 N. C., 131, overruling *Hoke v. Henderson,* 15 N. C., 1. The complaint, it is true, assails the statute in question on the ground that the plaintiffs occupied a constitutional office which the Legislature could not abolish, but counsel for the appellees admitted in their argument here that the office is one which may be abolished at the legislative will, and that the officers may be removed and their duties delegated to others.

Admitting this, the plaintiffs say, however, that the act vested in the board of managers all the powers theretofore possessed by the board of commissioners, and that it is void because, as admitted, it was not passed in compliance with Article II, sec. 14, of the Constitution. This section is as follows:

Sec. 14. No law shall be passed to raise money on the credit of the State, or to pledge the faith of the State, directly or indirectly, for the

payment of any debt, or to impose any tax upon the people of the State, or allow the counties, cities, or towns to do so, unless the bill for the purpose shall have been read three several times in each house of the General Assembly and passed three several readings, which readings shall have been on three different days, and agreed to by each house respectively, and unless the yeas and nays on the second and third readings of the bill shall have been entered on the journal.

More particularly stated, the argument of the plaintiffs is based on the proposition that the object of the act is to raise revenue for the county; that, while the word "taxes" does not appear in the act, the commissioners were given power to levy, in like manner with the State taxes, all necessary taxes for county purposes (C. S., 1297 (2), Revenue Act, sec. 2; and that the managers for the county, succeeding to the duties of the commissioners, are necessarily invested with like power. This position raises the question whether the power of taxation was bestowed upon the board of commissioners as an original corporate entity, or whether it was vested in the county as a body politic and corporate to be exercised by the board of commissioners as a county agency or instrumentality provided by legislative enactment. If the latter is the correct position a mere change in the taxing instrumentality would not necessarily impair or affect the original grant of the power to tax; and if the power to tax remains unimpaired in the county the act in question providing for a mere change of the instrumentality need not have been passed in compliance with the formalities prescribed by Article II, sec. 14, of the Constitution. This seems to be evident from the article itself. It provides, as we have seen, that no law shall be passed to *impose any tax* or allow the counties, cities, or towns to do so unless the specified conditions are complied with; but it has no reference to the officers who impose the tax. The abolition of one board by whom the tax is to be levied and the substitution of another who is to perform the identical office is not the imposition of a tax within the meaning of this section. See *Cotton Mills v. Waxhaw*, 130 N. C., 293; *Lutterloh v. Fayetteville*, 149 N. C., 65.

There is no suggestion that the body of our statute law (Consolidated Statutes, including the Revenue Act) was not enacted in conformity with the Constitution. As, therefore, the power of taxation cannot be impeached, it is material to determine where such power resides—whether in the county or in the board of commissioners.

As a general rule, the existence of a county may be regarded as continual or perpetual, notwithstanding any change in the officers by whom its corporate functions are to be exercised. Indeed, its functions can be performed only by some kind of agency or instrumentality, as the business of all corporations is conducted by its officers or agents. Every

county is a body politic and corporate, and has the powers prescribed by statute and those necessarily implied by law, and no others; and these powers are exercised by the board of commissioners, or in pursuance of a resolution adopted by them. C. S., 1290. The board of commissioners, then, is an instrumentality or *quasi* agency appointed to supervise and control the institutions and finances of the county in which as a body corporate the original grant of power resides. This seems to be apparent from the statutes defining its powers. It may borrow money for necessary expenses, but the debt is that of the county; with the approval of the General Assembly it may submit to a vote of the qualified electors a proposition to loan the credit of the county; it may make orders respecting county property; and it may provide for the maintenance of the poor at the expense of the county. It may discharge a number of other statutory duties; but its powers are exercised on behalf of the county and its acts are the acts of the county. The provision in C. S., 1297, that "the boards of commissioners of the several counties shall have power . . . to levy, in like manner with the State taxes, the necessary taxes for county purposes"; and the provision in the Revenue Act, sec. 2, that "there shall be levied by the board of commissioners in each county a tax on each taxable poll," must be construed in the light of the restriction set forth in Article VII, sec. 2, of the Constitution. The entire trend of legislation enacted in pursuance of this section of the Constitution indicates the exercise of powers delegated for specific purposes to an instrumentality or *quasi* agency of the county. The taxes thus authorized are really levied by the county through the instrumentality of the board of commissioners. *Fountain v. Pitt,* 171 N. C., 113; *Wilson v. Holding,* 170 N. C., 352; *Halford v. Senter,* 169 N. C., 546; *Buck v. Comrs.,* 159 N. C., 335; *Cotton Mills v. Comrs.,* 108 N. C., 678; 15 C. J., 456 (102).

In our opinion, the logical conclusion is that the board of managers was substituted for the board of commissioners by constitutional authority (Art. VII, sec. 14), and that the act under consideration is not invalidated by a failure to observe the formalities laid down in Art. II, sec. 14.

It was urged on behalf of the plaintiffs that the act considered most favorably for the defendants is a material amendment of the law conferring the original power to tax, and upon the admitted facts is, therefore, null and void. It is true that a material amendment to a statute authorizing the imposition of a tax must conform to the requirements of Article II, sec. 14, of the Constitution. *Road Com. v. Comrs.,* 178 N. C., 61; *Guire v. Comrs.,* 177 N. C., 516; *Claywell v. Comrs.,* 173 N. C., 657; *Russell v. Troy,* 159 N. C., 366. It is also true that an

amendment will not ordinarily be deemed material unless it purports to levy a tax or to create or increase a debt, or to change the rate of interest or the time of payment, or otherwise to broaden the scope of the amended act, or materially to affect its financial features. *Glenn v. Wray,* 126 N. C., 730; *Brown v. Stewart,* 134 N. C., 357; *Comrs. v. Stafford,* 138 N. C., 453; *Bank v. Lacy,* 151 N. C., 3; *Gregg v. Comrs.,* 162 N. C., 479; *Brown v. Comrs.,* 173 N. C., 598; *Wagstaff v. Highway Comm.,* 177 N. C., 354. In our interpretation of the statutes, none of these provisions appears in or is directly or indirectly made a part of the act before us, but simply the substitution of a new board by whom authorized taxes may be levied.

The judgment of the Superior Court is

Reversed.

ANNIE PRIDGEN v. SIDNEY PRIDGEN ET AL.

(Filed 16 September, 1925.)

1. Pleadings—Motions—Demurrer—Judgments—Statutes.

Plaintiff's motion for judgment upon the pleadings after answer filed is in effect a demurrer thereto, and will be denied if the answer, liberally construed, sets forth a sufficient defense to the complaint. C. S., 535.

2. Dower—Parol Trusts—Marriage.

Dower in her husband's land after his death cannot be assigned to his wife if he had only the naked legal title at the time of his death, and no beneficial interest therein is descendible to his heirs at law in case of intestacy, as where a valid parol trust therein had been created by the testator in favor of his children by his first marriage being of age, upon an expressed agreement that they would purchase the land with the returns from their joint labor, reserving a life estate for the father, in whose name alone the legal title had been taken, and the dower is thereafter claimed by his second wife.

APPEAL by defendants from *Sinclair, J.,* at May Term, 1925, of NASH.

Special proceedings by plaintiff, widow of J. Henry Pridgen, against Sidney Pridgen and others, heirs at law of J. Henry Pridgen, deceased, for dower. From a judgment on the pleadings in favor of the plaintiff, defendant appealed.

The plaintiff alleged her marriage to J. Henry Pridgen, the death of her husband, and his seizin during coverture of three tracts of land, the Hollingsworth, the Collie, and the Vester & Upchurch tracts, and prayed for the admeasurement of dower in usual form. Defendants, who are children of J. Henry Pridgen by a former marriage, admitted

the marriage and death of the husband, and that he left surviving him the defendants, his children by both marriages, and, as to the seizin, alleged as follows:

"That so much of said petition as alleges that the said J. Henry Pridgen, during his coverture with the petitioner, was seized in fee simple and possessed of the lands described in the petition is untrue and is denied; the truth in respect to the ownership in said lands is as follows: The said Annie Pridgen is the second wife of the said J. Henry Pridgen; that the said J. Henry Pridgen, as a young man, married Thaney Pettiford, and they lived and worked together for more than twenty years, and there were born to them as children these defendants, Sidney Pridgen, Charlie Pridgen, Anna Pridgen, who married T. O. Stokes; May Pridgen, and A. B. Pridgen; that the said J. Henry Pridgen was a poor man at the time he was married to the mother of these defendants and continued so until these defendants had grown up. He then made an agreement with these defendants that if they would remain with him and work with him that he would use the proceeds of their labor in the purchase of a tract of land, and that he would hold said land in trust for these defendants, subject to a life estate in his own favor, and purchased and paid for a tract of land.

"In pursuance of said contract and agreement, these defendants did remain with their father and worked hard and faithfully for him for many years, and out of the profits of their labor was paid the purchase price of the three tracts of land described in the petition, and while the deeds therefor were made to the said J. Henry Pridgen, it was expressly understood in agreement that he was holding the same in trust for these defendants, subject to his life estate, and when requested by these defendants to do so would execute to them a deed conveying to them the said land and effectuating said agreement.

"That after all of the said tracts of land had been bought and fully paid for, and after the mother of these defendants had died, the said J. Henry Pridgen married his second wife, the petitioner herein, and there were born to him by her one of the second set of children, the other defendants in this action. That after his second marriage the said J. Henry Pridgen ceased to accumulate property and became involved in debt."

The plaintiff moved for judgment upon the pleadings, and the cause was heard upon the complaint, answer, and the following deed:

"This indenture, made this 10th day of May, in the year of our Lord one thousand nine hundred and thirteen, between J. H. Pridgen, of the county of Nash and State of North Carolina, of the first part, and Charley Ransom Pridgen, Ann Elizabeth Stokes, Henry May Pridgen, and Al Branch Pridgen, all of the county and State aforesaid. The

object and consideration of this conditional deed by J. H. Pridgen, to become valid at his death to the above-named children of his, is to give them a certain tract of land to be equally divided between them at his death; that is to say, provided the said J. H. Pridgen is the owner of the land below described at the time of his death, as follows: One tract of land bounded as follows: On the south by the lands of Lucy Matthews, deceased; on the west by the lands of heirs of Jordan Vester; on the north and east, lands of Mrs. Anna B. Bunn, containing one hundred fifteen and one-half acres, more or less. The home tract on which the said J. H. Pridgen now resides."

The following judgment was rendered:

"This cause coming on to be heard before the undersigned judge of the Superior Court, and being heard upon the complaint and answer and the certain deed made by J. H. Pridgen to certain of his children on 10 May, 1913, duly registered in Nash County, 25 May, 1925, which defendants by leave of court offered as part of the answer, after argument of the counsel; and it appearing to the court that the defendants do not ask to reform the deed referred to in the petition, and it further appearing that there is no intimation in the answer of any mistake in the drafting of the deed or that it was taken by mistake, accident, or fraud.

"It is considered, adjudged, and ordered that the petitioner is entitled to dower in the lands described in her petition, and that the same be duly allotted to her in the manner prescribed by law."

The defendants who are the children of the marriage of plaintiff and J. Henry Pridgen do not resist plaintiff's claims, and admit that the plaintiff is entitled to dower as sued for, but to this judgment the defendants who are the children of J. Henry Pridgen's first marriage excepted and appealed.

Cooley & Bone and I. T. Valentine for plaintiff.

Austin & Davenport, W. M. Person, and W. H. Yarborough for defendants.

VARSER, J. The plaintiff's motion for judgment upon the answer is, in effect, a demurrer to the answer, and can only prevail when the matters pleaded constitute an admission of plaintiff's cause of action or are insufficient as a defense or constitute new matter insufficient in law to defeat plaintiff's claim. *Alston v. Hill*, 165 N. C., 255, 258; *Churchwell v. Trust Co.*, 181 N. C., 21. Under C. S., 535, we construe the defendants' answer liberally, with a view to substantiate justice between the parties. This means that every reasonable intendment must be taken in favor of the pleader, and if the answer contains facts sufficient to constitute a defense, it must be sustained. *Hartsfield v. Bryan*, 177

N. C., 166; *Parker v. Parker,* 176 N. C., 198; *Muse v. Motor Co.,* 175 N. C., 466; *Wyatt v. R. R.,* 156 N. C., 307; *Brewer v. Wynne,* 154 N. C., 467; *Ludwick v. Penny,* 158 N. C., 104; *Stokes v. Taylor,* 104 N. C., 394; *Gregory v. Pinnix,* 158 N. C., 147; *R. R. v. Main,* 132 N. C., 445; *Phifer v. Giles,* 159 N. C., 142; *McNinch v. Trust Co.,* 183 N. C., 33, 41.

The common-law rule requiring every pleading to be construed against the pleader has been materially modified by C. S., 535. *Sexton v. Farrington,* 185 N. C., 339. Therefore, as against a demurrer, a pleading will be upheld if any part presents facts sufficient to constitute a cause of action or defense, or if facts sufficient for that purpose can be gathered from it under a liberal, yet reasonable, construction of its terms. It will not be overthrown unless it is wholly insufficient. *Sexton v. Farrington, supra; Blackmore v. Winders,* 144 N. C., 212; *Bank v. Duffy,* 156 N. C., 83; *Eddleman v. Lentz,* 158 N. C., 65; *Hendrix v. R. R.,* 162 N. C., 9; *Foy v. Foy,* 188 N. C., 518; *Churchwell v. Trust Co., supra.*

Viewing the defendants' answer in the light of this settled rule of construction, we are constrained to hold that the answer sets up a trust between J. Henry Pridgen and the defendants who are the children of his first marriage, which attached to the lands in controversy prior to the marriage of the plaintiff and J. Henry Pridgen, on account of which J. Henry Pridgen was not beneficially seized during plaintiffs' coverture of such an interest in the lands in controversy as was purchased from the profits arising from the labors of these defendants after they became *sui juris.*

Dower is now, and has been since the act of 2 March, 1867, the legal right of a widow whose husband dies intestate, or when she dissents from his will, to have alloted to her upon the death of her husband one-third in value of all the lands, tenements, and hereditaments (including both legal and equitable estates) whereof her husband was beneficially seized during the coverture. C. S., 4100; *Allen v. Saunders,* 186 N. C., 349; *Thompson v. Thompson,* 46 N. C., 430; *Chemical Co. v. Walston,* 187 N. C., 817; *McGehee v. McGehee,* 189 N. C., 558; Mordecai's Law Lectures, 516, 519; 9 R. C. L., 561; 2 Blackstone, 131; *Pollard v. Slaughter,* 92 N. C., 72. A requisite of seizin is that it must be beneficial and not a mere naked seizin for the benefit of others. *Hendren v. Hendren,* 153 N. C., 505; *Alexander v. Cunningham,* 27 N. C., 430; *Thompson v. Crump,* 138 N. C., 32; *Gilmore v. Sellars,* 145 N. C., 283; *Waller v. Waller,* 74 Grattan's Reports (Va.), 83; *McAuley v. Grimes,* 15 Gill & Johnson (Md.), 318, 324; *Stanwood v. Dunning,* 14 Me., 290; *Edmondson v. Welsh,* 27 Ala., 578; *Redding v. Vogt,* 140 N. C., 562; 9 R. C. L., 575, sec. 16.

This seizin contemplates and requires that the husband's seizin, whether in law or in deed, must be of an estate of inheritance. The test is whether any issue which she might have had could, by any possibility, inherit the land. *McGehee v. McGehee, supra;* 2 Blackstone, 131; *Pollard v. Slaughter, supra;* Mordecai's Law Lectures, 518.

It cannot be urged that the widow occupies the position in equity of a purchaser for value without notice of the defendants' equity to establish the trust. She is neither a creditor nor purchaser for value, although marriage is a valuable consideration in many relations. Dower does not arise from a contract of marriage, although marriage is a necessary precedent fact upon which the claim is asserted. There is no contract between husband and wife for either dower or curtesy. The law gives this right in respect to the property of the other to encourage matrimony. *Norwood v. Marrow*, 20 N. C., 578; *Haire v. Haire*, 141 N. C., 88. As stated in this latter case, the widow must rest her claim solely upon the beneficial seizin of her husband.

An unregistered deed delivered prior to the marriage defeats dower because it defeats seizin. *Haire v. Haire, supra; Blood v. Blood*, 23 Pick. (40 Mass.), 85; *Richardson v. Scofield,* 45 Me., 389.

A trust estate in favor of the defendants, in which J. Henry Pridgen was the beneficial owner of an estate for his life only, is not sufficient to support the plaintiff's claim for dower. *Hendren v. Hendren, supra.*

The plaintiff suggested that the court below treated *Vance v. Vance*, 118 N. C., 869, as a controlling authority in the case at bar. The difference, upon a close scrutiny, is vital. In the *Vance case* the court found the facts by consent of the parties, and failed to find sufficient facts to create a trust in favor of the defendants.

The trust, as alleged in the answer, is expressly recognized, and the method of its creation is set forth in *Wood v. Cherry,* 73 N. C., 110, and it comes clearly in the definition of the first mode of creation of a trust, to wit: "By transmutation of the legal estate, when a simple declaration will raise the use or trust." This is the settled law in this jurisdiction. *Jones v. Jones,* 164 N. C., 323; *Ballard v. Boyette*, 171 N. C., 26; *Brogden v. Gibson*, 165 N. C., 21; *Lefkowitz v. Silver*, 182 N. C., 344; *Bank v. Scott*, 184 N. C., 316; *Anderson v. Harrington*, 163 N. C., 142; *Allen v. Gooding*, 173 N. C., 95; *Edgerton v. Jones,* 102 N. C., 278; *Herring v. Sutton*, 129 N. C., 109; *Avery v. Stewart*, 136 N. C., 435; *Shields v. Whitaker*, 82 N. C., 519; *Pittman v. Pittman*, 107 N. C., 164; *Jones v. Emory*, 115 N. C., 165; *Cobb v. Edwards*, 117 N. C., 246; *Ramsey v. Ramsey*, 123 N. C., 688; *Russell v. Wade*, 146 N. C., 121.

The trust could only arise when proceeds of, or the profits from, their labor arose after these defendants became *sui juris*, for during

their minority their earnings were the property of J. Henry Pridgen, the father, and could not support the trust agreement. There is no implied promise to pay on the part of the father when the children remain with him after majority, and they must show in this case, as alleged by them, an express agreement to use their labor for them, and from it to purchase the land in trust for them. *Musgrove v. Kornegay,* 52 N. C., 71, 74; *Dodson v. McAdams,* 96 N. C., 149; *Grant v. Grant,* 109 N. C., 710, 713; *Daniels v. R. R.,* 171 N. C., 23.

The deed of 1913, as appears of record, does not contemplate *ex vi terminorum* a present vesting of the estate in the defendants, and expresses the continuance of the estate in the father. It may be that its effect was not understood by either the grantor or the grantees, but it is insufficient, though delivered prior to the second marriage, to bar dower. The 1921 deed of itself is of no effect against the plaintiff, and the defendants' only defense alleged is the trust. The parties must be left to try out the issue as to the alleged trust in the modes provided by law. *McGee v. McGee,* 26 N. C., 105.

Dower has long been a favorite of the law, ranking with life and liberty (Bacon Uses, p. 37), and showing a firm establishment in the Year Books, and probably originating from a Danish custom, "since," as Blackstone recalls, "according to historians of that country, dower was introduced into Denmark by Swein, the father of Canute, out of gratitude to the Danish ladies who sold all their jewels to ransom him when taken prisoner by the Vandals. However this be, the reason which our law gives for adopting it is a very plain and sensible one: for the sustenance of the wife and the rearing and education of the younger children." Since these early times the right of dower has been highly favored by the courts. 9 R. C. L., 563; *Hodge v. Powell,* 96 N. C., 64; *McMorris v. Webb,* 17 S. C., 558; *Lewis v. Apperson,* 103 Va., 624.

Dower, throughout the vicissitudes of governments, and despite the myriads of influences that have contributed to the common law of England, and the common law now in force in the United States, barring a few minor statutory modifications in some States, has maintained its early qualities and incidents. Our Constitution, Art. X, sec. 8, and C. S., 4099, 4100, 4101, 4102, 4103, and the machinery for the obtaining and enjoyment of dower, fully protect and maintain the esteem in which dower has always been held.

Upon the allegations in the answer, construed liberally, yet reasonably, in favor of the pleader, we are of opinion to hold that the judgment appealed from must be reversed, to the end that a trial may be had on the issue as to the trust alleged in the answer.

Reversed.

HERMAN NEWBERN ET AL. v. R. L. HINTON.

(Filed 16 September, 1925.)

1. Appeal and Error—Burden of Proof—Evidence.

The appellant must show error in the Supreme Court on appeal, and where he has excepted to the exclusion of evidence, the record must show the relevance and materiality of the evidence excepted to, and its bearing upon the issues.

2. Same—Conclusions of Law—Harmless Error.

The admission of testimony of a witness excepted to upon the ground that it contained a conclusion of law becomes immaterial when the law has been correctly stated by him.

3. Same—Instructions—Verdict.

Exceptions to the refusal of the trial judge to give appellant's prayers for special instruction cannot be sustained when the jury has found for appellant upon the evidence therein involved.

4. Deeds and Conveyances—Covenants—Warranty—Damages.

In an action to recover damages for a breach of warranty in a deed to lands upon the ground that defendant's grantee, the plaintiff, had received complete reimbursement in the sale of the lands to another to the extent of the purchase price: *Held*, the covenant of seizin does not run with the land, and is broken when the deed is delivered if the grantor does not own the land at the time of his covenant, and the right of action accrues only to his grantee.

5. Same—Equity.

In an action for damages for breach of warranty of seizin of lands: *Held*, no equity arises for defendant when it appears that the grantee, plaintiff, has since sold the land to another, and the difference in the purchase price paid to defendant and the purchase price received is more than the amount in suit.

6. Deeds and Conveyances—Warranty—Breach—Choses in Action.

Where a covenant of seizin in a deed to land is broken, it becomes a chose in action, and is not assignable.

7. Deeds and Conveyances — Covenants — Warranties—Heirs at Law—Purchaser—Fraud—Notice.

Where a defendant in an action for damages for breach of covenant in a deed to lands is one of the heirs at law of the deceased owner, and has obtained the title of the others by deed from them with knowledge of a probable caveat, he cannot maintain that he is a purchaser for value without notice of the defect in the title he has undertaken to convey.

8. Deeds and Conveyances—Covenants—Warranty—Breach—Measure of Damages.

In an action to recover damages for breach of covenant of warranty of title to lands upon allegation of part failure of title, or for the pro-

portion of the original purchase price represented by the failure of title, the rule of damages recoverable is that proportionate part of the purchase price affected by the failure of complete title, with interest thereon, when the outstanding interest has not been bought in by the plaintiff.

APPEAL by defendant from *Cranmer, J.*, at January Term, 1925, of PASQUOTANK.

This is a civil action by plaintiffs, purchasers, against the defendant, seller, on an alleged breach of a covenant of seizin, and from a judgment for plaintiffs, defendant appealed.

On 24 June, 1920, plaintiffs purchased the Cartwright land, containing some forty acres, from defendant for $40,000. The deed contained a covenant by defendant, "that he was seized of said premises in fee and had full right to convey the same in fee simple."

The plaintiffs alleged that defendant had, and conveyed only, title to a six-sevenths undivided interest in said lands, and that the children of John C. Hinton, defendant's deceased brother, owned an outstanding one-seventh interest. The defendant alleged that he owned the entire interest and that there was no breach of the covenant sued on.

The defendant also alleged, and offered to prove, that the plaintiffs conveyed the lands in controversy, with usual warranty, 6 February, 1923, and, therefore, they could not now maintain this action, which was instituted 24 January, 1923.

The evidence showed that this land was purchased by John L. Hinton from Mary E. Cartwright, administratrix of Samuel Cartwright, in 1889, and that John L. Hinton died in 1909, leaving surviving him the following children: C. L. Hinton, W. E. Hinton, E. V. Hinton, R. L. Hinton, Ida Sawyer, and Mary F. Hinton, and three children of a deceased son, John C. Hinton, as follows: Sophia Morgan, Flossie Nosay, and Ada Whitehurst.

Plaintiff introduced a deed from Mary F. Hinton, C. L. Hinton, E. V. Hinton, W. E. Hinton, and Ida Sawyer and husband, L. R. Sawyer, to R. L. Hinton, dated 1 February, 1912, and registered 29 January, 1913, conveying grantors' "rights, titles, and interests" in the lands in controversy for $12,500. This deed has, immediately after the description, the following statement: "The interests hereby conveyed is five-sixths of the said tract of land, and R. L. Hinton, having heired a one-sixth interest in said land, is now owner of the entire tract." The evidence is plenary that the defendant paid the purchase price recited in this deed.

It further appeared that John L. Hinton left a will, which was duly probated in common form in the Superior Court of Pasquotank County, 29 January, 1910. On 30 September, 1918, a caveat was filed to this will of John L. Hinton. The citations were issued 9 October, 1918.

The grounds of attack in the caveat were undue influence and want of sufficient mental capacity. The issues arising upon the caveat were tried at July Term, 1920, Pasquotank Superior Court, resulting in a verdict on both grounds for the caveators. On appeal to the Supreme Court, the judgment was affirmed. *In re Hinton,* 180 N. C., 206, Fall Term, 1920. This record, including the opinion of the Supreme Court, appears to have been introduced in evidence at the trial below. The verdict was as follows:

"1. Was defendant seized of and owner in fee of the entire tract of land described in the complaint at the time he executed deed to the plaintiffs? A. No.

"2. If not, of what part was he seized and the owner of? A. Six-sevenths.

"3. What damages, if any, are plaintiffs entitled to recover of defendant? A. One-seventh of $40,000, with interest from 24 June, 1920."

These issues were submitted by the court without objection.

The court, after giving the contentions of the parties as to the purchase price, charged that the measure of damages was the purchase price and interest, and that, upon a failure of one-seventh interest, it would be one-seventh of the purchase price with interest from 24 June, 1920.

The defendant excepted to the following portion of his Honor's charge: "I instruct you that if you find by the greater weight of the evidence the facts to be as testified to by the witnesses, you will answer the first issue 'No,' and the second issue, 'Six-sevenths.'"

Defendant's exceptions to the exclusion of evidence do not show what the defendant expected to prove, except the deeds from the plaintiffs to I. M. Meekins, each for a one-half undivided interest, and a deed of trust to one Gather, trustee, executed prior to the sale to Meekins, for $20,000, which was assumed by Meekins in the purchase.

It appeared that the plaintiffs received from the sale to Meekins $30,000 for the Cartwright land.

The defendant asked the court to instruct the jury as follows:

"1. That if the jury believes the evidence, the deed from E. V. Hinton and others to R. L. Hinton, dated 1 February, 1912, recorded in Book 37, p. 259, was valid to convey five-sixths undivided interest to R. L. Hinton, and that the said R. L. Hinton was a purchaser for value in good faith for the five-sixths interest.

"2. The jury is instructed that the failure or breach of the covenant of seizin was only one-seventh of one-sixth, to wit, the interest of R. L. Hinton, one-sixth; and that as John L. Hinton had seven children, the interest of one child, to wit, one-seventh, was not conveyed, so that there was outstanding unsold only one-seventh of one-sixth interest in

the Cartwright property sold to the plaintiffs, and the answer at most to the third issue would be one-forty-second of $40,000.

"3. If the jury believe the evidence the plaintiffs have sold their entire title and estate to the property described in the deed of R. L. Hinton to them since this action was begun, and have suffered no damage, and the jury will answer nothing to third issue.

"4. If the jury believe the evidence the defendant in any computation of the purchase price must consider only $40,000 paid to Morris was paid to him for his bargain with the defendant Hinton, and not as a part of the purchase price at which the defendant Hinton agreed to sell the land."

The court refused these requests and, from the judgment rendered upon the verdict, the defendant appealed.

Aydlett & Simpson for plaintiffs.
W. I. Halstead and Manning & Manning for defendant.

VARSER, J. We are precluded from passing upon the merits of defendant's objections to the evidence, since the record does not disclose what the witnesses would have said if the questions had been allowed. The burden is on the appellant to show error, and, therefore, the record *must show* the competency and materiality of the proposed evidence. This Court will not do the vain thing to send a case back for a new trial when it does not appear what the excluded evidence is, or even that the witnesses would respond to the questions in any way material to the issues. This is the established practice in this Court, in both civil and criminal cases. *Whitesides v. Twitty*, 30 N. C., 431; *Bland v. O'Hagan*, 64 N. C., 471; *Street v. Bryan*, 65 N. C., 619; *S. v. Purdie*, 67 N. C., 326; *Knight v. Killebrew*, 86 N. C., 402; *Sumner v. Candler*, 92 N. C., 634; *S. v. McNair*, 93 N. C., 628; *S. v. Rhyne*, 109 N. C., 794; *Baker v. R. R.*, 144 N. C., 40; *Boney v. R. R.*, 155 N. C., 95; *Stout v. Turnpike Co.*, 157 N. C., 366; *Dickerson v. Dail*, 159 N. C., 541; *Fullwood v. Fullwood*, 161 N. C., 601; *In re Smith's Will*, 163 N. C., 466; *Wallace v. Barlow*, 165 N. C., 676; *Lumber Co. v. Childerhose*, 167 N. C., 40; *Brinkley v. R. R.*, 168 N. C., 428; *Morton v. Water Co.*, 168 N. C., 582, 587; *Wilson v. Scarboro*, 169 N. C., 654; *Schas v. Assurance Society*, 170 N. C., 421; *In re Edens*, 182 N. C., 398; *Snyder v. Asheboro*, 182 N. C., 708; *S. v. Jestes*, 185 N. C., 735; *Hosiery Co. v. Express Co.*, 186 N. C., 556; *S. v. Ashburn*, 187 N. C., 717, 722; *Barbee v. Davis*, *ibid.*, 79, 85; *Smith v. Myers*, 188 N. C., 551; *S. v. Collins*, 189 N. C., 15.

While the court refused to give the defendant's fourth prayer for instructions, the action of the court has not prejudiced the defendant, because the jury has accepted this view and has found the purchase

price to be $40,000. If any error was committed in this regard, it is clearly harmless.

The deeds of plaintiffs to Meekins were not competent evidence at the instance of the defendant, since they and the other evidence did not show any basis for a contention that the plaintiffs received complete reimbursement to the extent of the purchase price paid Hinton when they sold to Meekins. The covenant of seizin does not run with the land, and is broken when the deed is delivered, if the grantor does not own the lands according to his covenant, the right of action accrues at once to him, and to him alone. *Eames v. Armstrong,* 142 N. C., 506, 515; *Markland v. Crump,* 18 N. C., 94; *Wilder v. Ireland,* 53 N. C., 85, 90; *Britton v. Ruffin,* 123 N. C., 67; Jones on Covenants, sec. 851; *Pridgen v. Long,* 177 N. C., 189; *Wilson v. Vreeland,* 176 N. C., 504; *Webb v. Wheeler,* 17 L. R. A. (N. S.), 1178, 1183, and citations noted; *Cover v. McAden,* 183 N. C., 642; *Meyer v. Thompson,* 183 N. C., 545; *Lockhart v. Parker,* 189 N. C., 138; Rawle on Covenant for Title, ch. 10, sec. 202; Mordecai's Law Lectures, 901.

The difference in the purchase price paid to the defendant and the purchase price received from Meekins is more than the amount sued for; hence, there can arise no equity for defendant from this sale.

The covenant of seizin is, when broken, a chose in action, not assignable at common law, and this rule still obtains. Mordecai's Law Lectures, 859, 860; *Eames v. Armstrong, supra; Lockhart v. Parker, supra; Grist v. Hodges,* 14 N. C., 198, 202; *Shankle v. Ingram,* 133 N. C., 254.

The defendant's contention that he is a purchaser for value and without notice from his brothers and sisters, under the deed in 1912, cannot be sustained. It appears from the record, which includes the opinion in *In re Hinton,* 180 N. C., 206, that the defendant, R. L. Hinton, cannot assume now the position of a purchaser for value, *without notice* of the rights of the children of John C. Hinton, deceased, to attack the will of their grandfather with success. This prevents us from considering whether the doctrine announced in *Newbern v. Leigh,* 184 N. C., 166, applies, in any event, to a devisee in a will that is subsequently set aside upon a caveat, when such a devisee is an heir at law of the maker of the contested will.

The rule of damages in a breach of a covenant of seizin is the purchase price, with interest. This still remains the rule, when the breach is a partial failure of the title. *Wilson v. Forbes,* 13 N. C., 40; *Eames v. Armstrong, supra;* 7 R. C. L., 1175, sec. 93; Mordecai's Law Lectures, 899; *Price v. Deal,* 90 N. C., 291; *Crowell v. Jones,* 167 N. C., 286.

The plaintiffs have only sued for the proportion of the original purchase price represented by the failure of title. *Hartford Ore Co. v.*

Miller, 41 Conn., 112; *Guthrie v. Prigslie,* 12 N. Y., 126; Rawle on Covenants, secs. 186, 187; 7 R. C. L., 1170, sec. 87; 24 A. L. R., 267; *Campbell v. Shaw,* 170 N. C., 186; *Lemly v. Ellis,* 146 N. C., 221.

If the plaintiffs had bought the outstanding interest, then the measure of damages would be the amount expended therefor, with interest, not exceeding, in any event, the pro rata of the original purchase price. *Lemly v. Ellis, supra; Campbell v. Shaw, supra.*

We are of the opinion that the trial court was correct in the instructions given to the jury, and, therefore, there is

No error.

W. S. SWAIN v. J. T. OAKEY.

(Filed 16 September, 1925.)

Arrest—Slander—Malice.

In order for the arrest of defendant after judgment against him in an action for slander, it must appear by answer of the jury to a separate issue that the words falsely or slanderously spoken were actuated by defendant's actual malice toward the plaintiff.

MOTION for arrest of defendant heard before *Sinclair, J.,* at January Term, 1925, of NASH.

The following is the statement of case on appeal:

This was a motion for an order to issue execution against the person of the defendant, heard on appeal from the clerk by Hon. N. A. Sinclair, judge presiding, at the January Term, 1925, of Nash Superior Court.

On 16 May, 1921, the plaintiff, W. S. Swain, brought an action in the Superior Court of Nash County against J. T. Oakey, the defendant above named, for the recovery of damages for injury to his character by reason of certain alleged slanderous utterances of the defendant set out in the complaint.

The defendant, J. T. Oakey, in his answer denied that he had spoken the alleged slanderous words of the plaintiff and denied that he had any ill-will or malice toward the plaintiff in the action. The action was tried before the Hon. O. H. Allen, judge presiding, and a jury, at the October Term, 1924, of the Superior Court.

The following issues were eliminated from the pleadings and submitted to the jury, to wit:

"Q. Did the defendant, in substance, speak of the plaintiff the language alleged in the complaint? A. Yes.

"Q. What damage, if any, is the plaintiff entitled to recover? A. $1,000."

On the coming in of the verdict, his Honor, Judge Allen, rendered the following judgment:

This is an action for injury to character arising from slanderous utterances made by defendant of and concerning the plaintiff, as alleged in the complaint. The cause having been tried by the jury at this term and the jury having answered the issues in favor of the plaintiff, as shown by the records, it is now ordered and adjudged: That the plaintiff recover of the defendant the sum of $1,000 and the costs of this action as taxed by the clerk. O. H. ALLEN, *Judge.*

Thereafter, on 12 December, 1924, plaintiff, after due notice in writing, moved before the clerk for an execution against the person of the defendant. The clerk, after hearing the motion, ordered execution to issue against the person of the defendant, and from such order of the clerk the defendant excepted and appealed to the judge in term time.

The appeal from the clerk was heard at the January Term, 1925, as above stated, his Honor, Judge Sinclair, ordered and adjudged that execution should issue in accordance with plaintiff's motion, when requested by him upon the judgment referred to in said motion against the person of the defendant, J. T. Oakey, commanding the sheriff to seize the person of said defendant and safely hold him until said judgment, interest, and costs be paid, or defendant be otherwise discharged according to law from this judgment.

The defendant duly excepted to said judgment, assigned error, and appealed to the Supreme Court.

The assignments of error are as follows:

(1) For that his Honor signed the judgment set out in the record directing execution to issue against the person of the defendant.

(2) For that his Honor erred in holding as a matter of law that the plaintiff, W. S. Swain, was entitled under the issues submitted to the jury, the answer thereto made by the jury, and the judgment at the October Term, 1924, for execution against the person of the defendant, J. T. Oakey.

Battle & Winslow for plaintiff.
Thorne & Thorne for defendant.

CLARKSON, J. The motion for arrest of defendant is based on C. S., 768, subsec. 1, which is as follows:

"The defendant may be arrested as hereinafter prescribed in the following cases:

"1. In an action for the recovery of damages on a cause of action not arising out of contract, where the defendant is not a resident of the State, or is about to remove therefrom, or where *the action is for injury to person or character,* or for injuring, or for wrongfully taking, detaining, or converting real or personal property."

In the present case the order of arrest is founded on an action for injury to character—slander, a tort, an action *ex delicto.*

In slander, malice must be shown. There are two kinds: (1) Implied, "malice in law"; (2) Actual, "malice in fact." Malice may be implied or presumed from the use of certain words, as charging a person with a felony—the words are actionable *per se,* and by the use of the words the law presumes or implies malice. Or there must be actual malice, sometimes termed particular malice, which is ill-will, grudge, desire to be avenged on a particular person.

Newell, Slander and Libel (4 ed.), part sec. 271, defines malice: "The word malice as a term of law has a meaning somewhat different from that which it possesses in ordinary parlance. In its ordinary sense 'malice' denotes ill-will, a sentiment of hate or spite, especially when harbored by one person toward another. The word is so employed in the well-known sentence in the litany of the Church of England, 'From envy, hatred, and malice,' etc. This is what the law terms 'malice in fact,' 'actual,' or 'personal' malice, to distinguish it from the legal sense attributed to the terms, and which, from being used in such sense, is accordingly designated 'malice in law,' which signifies a wrongful act intentionally done without any justification or excuse."

Where malice is presumed or implied from the use of words actionable *per se,* ordinarily compensatory damages are awarded. To obtain punitive or exemplary damages, actual malice must be shown, as was said by *Stacy, J.* (now *C. J.*), in *Ford v. McAnally,* 182 N. C., at p. 421: "Punitive damages, sometimes called smart money, are allowed in cases where the injury is inflicted in a malicious, wanton, and reckless manner. The defendant's conduct must have been actually malicious or wanton, displaying a spirit of mischief toward the plaintiff, or of reckless and criminal indifference to his rights. When these elements are present, damages commensurate with the injury may be allowed by way of punishment to the defendant. But these damages are awarded on the grounds of public policy, for example's sake, and not because the plaintiff has a right to the money, but it goes to him merely because it is assessed in his suit. Both the awarding of punitive damages and the amount to be allowed, if any, rest in the sound discretion of the jury. *Cobb v. R. R.,* 175 N. C., 132; *Fields v. Bynum,* 156 N. C., 413; *Hayes v. R. R.,* 141 N. C., 199; *Smithwick v. Ward,* 52 N. C., 64. However, the amount of punitive damages, while resting in the sound discretion of the jury, may not be excessively disproportionate to the circumstances

of contumely and indignity present in each particular case. *Gilreath v. Allen,* 32 N. C., 67; *Sloan v. Edwards,* 61 Md., 100; *Bernheimer v. Becker,* 3 L. R. A. (N. S.), 221." Under certain facts and circumstances, actual malice may be inferred.

"In cases where malice is implied, it is not an issue. The issue of actual malice or malice in fact may be and is raised by the demand of plaintiff for punitive damages, or by allegation of defendant that the publication was privileged, and when defendant seeks mitigation of damages, but has no relevancy to a defense of justification." 37 C. J., p. 56.

In *Scott v. Times-Mirror Co.,* 181 Cal., p. 358, it is said: "It is well established that in actions for civil libel where the plaintiff seeks to recover punitive or exemplary damages, or where the defendant alleges that the publication was justified on the ground that it was privileged, actual malice or malice in fact becomes an issue. As we have pointed out, the issue of actual malice was raised in this case both by the demand of the plaintiff for punitive damages and by the allegation of the defendant that the publication was privileged."

We do not think defendant could be arrested unless it is shown in using the words spoken he did so with actual malice. There is no issue of actual malice presented by the record. In actions of this kind after verdict and judgment to arrest the defendant it should appear affirmatively that the slander—the words spoken—were done with actual malice and an issue submitted to the jury. This does not appear to have been done from the record. *Ledford v. Emerson,* 143 N. C., p. 527; *Oakley v. Lasater,* 172 N. C., p. 96; *Coble v. Medley,* 186 N. C., p. 479, and cases cited.

In *Elmore v. R. R.,* 189 N. C., p. 674, we said: "There was no separate issue as to punitive damages, and on the record there is no way to ascertain if any of the damages awarded plaintiff were punitive."

For the reasons given, the judgment below is

Reversed.

SADIE A. HUDSON, ADMINISTRATRIX OF WILLIAM HUDSON, DECEASED, v. NORFOLK SOUTHERN RAILROAD COMPANY.

(Filed 16 September, 1925.)

Negligence — Last Clear Chance — Pleadings — Evidence — Burden of Proof—Railroads.

In an action against a railroad company to recover damages for the negligent killing of plaintiff's intestate, a trespasser, wherein from the pleadings and evidence the issue of the last clear chance arises, the burden of proof of the issue shifts back to the plaintiff in the action.

HUDSON *v.* R. R.

APPEAL by defendant from *Cranmer, J.*, at February Term, 1925, of BEAUFORT.

This is an action to recover damages for death of plaintiff's intestate, alleged to have been caused by the negligence of defendant. The issues were answered by the jury as follows:

1. Was plaintiff's intestate killed by the negligence of defendant, as alleged? Answer: Yes.

2. If so, did plaintiff's intestate by his own negligence contribute to the said death? Answer: Yes.

3. If so, could the defendant, notwithstanding the contributory negligence of the deceased, by the exercise of reasonable prudence and proper care, have avoided killing the deceased? Answer: Yes.

4. If so, what damages, if any, is the plaintiff entitled to recover? Answer: $480.

From judgment on this verdict, defendant appealed.

Ward & Grimes for plaintiff.
Small, MacLean & Rodman for defendant.

CONNOR, J. The jury having answered the first and second issues in the affirmative, plaintiff was not entitled to recover of defendant damages for the death of her intestate, unless, upon the evidence, she could invoke, successfully, the principle of law, upon which the doctrine of the "last clear chance" is founded. Although the death of plaintiff's intestate was caused by the negligence of defendant, the right to recover damages was barred by the contributory negligence of the deceased unless, notwithstanding such contributory negligence, defendant could, by exercise of proper care, have avoided the injury. Such contributory negligence was relied upon by defendant as a defense to plaintiff's action to recover damages by reason of the negligence of defendant; it was set up in the answer of the defendant, and, as appears by the answer of the jury to the second issue, was proved on the trial, C. S., 523. Plaintiff's intestate was not an employee of defendant railroad company, C. S., 3467; he was struck by defendant's train while on its track at its intersection by a farm road. Plaintiff, to repel the bar to her recovery on account of the contributory negligence of her intestate, relied upon the doctrine of the "last clear chance," contending that the jury should answer the third issue "Yes." Upon this issue the court charged as follows:

"So, gentlemen, we are considering, now, the third issue: 'If so (that is—if plaintiff's intestate was guilty of contributory negligence), could the defendant, notwithstanding the contributory negligence of the deceased, by the exercise of reasonable prudence and proper care, have

avoided killing the deceased.' The burden of the issue, gentlemen of the jury, is upon the defendant to satisfy you by the greater weight of the evidence. This involves the doctrine of what the law calls the last clear chance,—that the defendant, as plaintiff contends in this action, had the last clear chance to avoid the injury resulting in the death of plaintiff's intestate, Mr. William Hudson. Now, as I have stated to you, the burden of the issue is upon the defendant to satisfy you by the greater weight of the evidence."

Defendant excepted to this instruction and assigns same as error.

The late *Chief Justice Clark,* in his concurring opinion in *Horne v. R. R.,* 170 N. C., at page 653, says: "The decisions are uniform that in cases of injury to a trespasser on the track, there should be a third issue submitted: 'whether, notwithstanding the contributory negligence of the plaintiff, the defendant could with reasonable care have avoided the injury'; and that the burden of this issue is upon the defendant."

It was stated upon the argument of the appeal in this Court that the judge presiding at the trial cited and relied upon this statement as authority for his instruction. We are unable to reconcile this statement, as to the burden of proof upon the issue as to the "last clear chance," with the law as declared by this Court in its opinion, written by *Douglas, J.,* in *Cox v. R. R.,* 123 N. C., 604. It is there said:

"It would almost seem needless to repeat what we have so often said, that the burden of proving negligence rests upon the plaintiff, while the onus of showing contributory negligence rests upon the defendant. In both cases, this must be shown by a greater weight of the evidence and of this relative weight the jury alone can determine. A negative presumption necessarily accompanies the burden and remains until the burden is lifted or shifted by direct admissions or a preponderance of proof. Each issue bears its own burden, and it rarely happens that the burden of all the issues rests upon the same party. In cases of negligence, like the present, it changes with each successive step, it being necessary for the plaintiff to prove the negligence of the defendant, the defendant the contributory negligence of the plaintiff, and again for the plaintiff to show the last clear chance of the defendant, if that issue becomes material."

Cox v. R. R., supra, has been frequently cited in opinions of this Court as authority for propositions of law declared therein. See Clark's Anno. Ed. It is cited with approval in the opinion of the Court written by *Walker, J.,* in *Lea v. Utilities Co.,* 178 N. C., 509, who says:

"The burden was upon the plaintiff to satisfy the jury upon the first issue that the defendant was negligent and that its negligence was the proximate cause of the injury to him. This was his only burden. When

he had established the defendant's negligence as the proximate cause of his injuries, the burden then shifted to the defendant and it was required to prove, under the second issue, the plaintiff's contributory negligence. When it has done that, the burden again shifts, but this time to the plaintiff, and he must show, under the third issue, that notwithstanding the plaintiff's negligence, the defendant could, by the exercise of ordinary care, have prevented the injury to him." This, and not the statement found in the concurring opinion cited, is the "last clear statement" by this Court of the law as to the burden of proof upon the issue as to the "last clear chance." There was no dissent to the opinion of the Court in *Lea v. Utilities Company, supra.* We find no opinions of this Court, in which the statement of the *Chief Justice* that the decisions of this Court are uniform that the burden of proof is on the defendant upon the third issue, is sustained. All the decisions are to the contrary. *Hill v. R. R.,* 169 N. C., 740; *Brown v. R. R.,* 172 N. C., 604; *Smith v. Electric R. R.,* 173 N. C., 489; *Lea v. Utilities Co.,* 178 N. C., 509. The statement of the *Chief Justice* was manifestly an inadvertence. It is not an authority sustaining the instruction which defendant assigns as error.

Nor can the instruction be sustained on general principles. The plaintiff asserted the affirmative of the issue, and therefore assumed the burden; *Speas v. Bank,* 188 N. C., 524; *Hunt v. Eure,* 189 N. C., 483, 20 R. C. L., 138. "In order to invoke the 'last clear chance' doctrine, plaintiff must plead and prove that the defendant, after perceiving the danger, and in time to avoid it, negligently refused to do so." 11 C. J., 282.

It is needless to pass upon or discuss the other assignments of error. For the error in the instruction that the burden of proof was upon the defendant there must be a

New trial.

FOWLE MEMORIAL HOSPITAL COMPANY ET AL. v. J. L. NICHOLSON ET AL.

(Filed 16 September, 1925.)

Trusts—Limitation of Actions—Disavowal of the Trust—Notice.

The law does not favor one who having assumed a trust and then seeks to discontinue it, and holds the subject thereof to his own benefit, and for the ten-year statute of limitations to bar an action in his favor, the disavowal of the trust must have been by clear and unequivocal acts and words brought to the notice of the *cestui que trust.* The three-year statute is inapplicable.

HOSPITAL *v.* NICHOLSON.

APPEAL by plaintiffs from *Cranmer, J.*, at February Term, 1925, of BEAUFORT.

From a judgment, dismissing the action on the plea of the three years statute of limitations, the plaintiffs appealed.

This case was heard on plaintiffs' appeal, and remanded, as appears in 189 N. C., 44. When this case again came on to be heard, the three years statute of limitations, (C. S., 441, subsec. 9) having been pleaded, the parties asked the Court to dispose of this plea before considering the matters left open for decision in the former appeal. A hearing upon this plea resulted in the following judgment:

"This cause coming on to be heard at the February Term, 1925, of court, before his Honor, E. H. Cranmer, judge presiding, and a jury; and the statute of limitations having been pleaded by the defendants; and it appearing to the court, from the face of the pleadings, that the lease to J. L. Nicholson, which is sought to be annulled in said action, was executed and delivered on 5 January, 1921, and that the said Nicholson, forthwith, went into possession thereunder, and that this action was instituted on 3 April, 1924, counsel on both sides having asked the court to pass upon the plea of the statute of limitations before the introduction of evidence on the other issues raised by the pleadings, and the court being of the opinion that said action is barred by the three years statute of limitations which was pleaded by the defendants, it is so adjudged and decreed that this action be, and the same is hereby, dismissed."

The plaintiffs again appealed. The other pertinent facts are set out in the report of the former appeal.

Wiley C. Rodman and Small, MacLean & Rodman for plaintiffs.
H. C. Carter and Ward & Grimes for defendant.

VARSER, J. The record does not disclose a disavowal of the duties growing out of the trust created by the charter of the plaintiff corporation, and the conveyances to it, more than three years prior to the date of the institution of this action. The facts now appearing are not sufficient to constitute notice to plaintiffs that such duties would no longer be performed by the defendant lessee, and that the hospital in controversy would not be operated as a community hospital, but for the private gain of the defendant, J. L. Nicholson.

In our opinion, the facts set out in the judgment appealed from, fall short of what is necessary to constitute sufficient disavowal of an active continuing trust, which will put the *cestui que trust* to his right of action to secure performance. The law does not favor, or aid, him who attempts to put an end to a trust, and, therefore, he must make such

a disavowal in no uncertain terms and without qualification. It must be done by clear and unequivocal acts or words brought to the notice of the *cestui que trust*. *Rouse v. Rouse*, 167 N. C., 208; *Rouse v. Rouse*, 176 N. C., 171; *University v. Bank*, 96 N. C., 280, 287.

The property of the plaintiff Hospital Corporation is impressed with the trust contained in its charter, and the conveyances to it. Its certificate of organization shows a positive intention to protect its welfare, and the deed from the town of Washington provides for a reversion in case of failure to maintain and operate a hospital in accordance with the terms of the deed for five successive years.

The relation of the defendant lessee is such, that he cannot obtain a conveyance, by lease or otherwise, that is for, or contemplates, a use of the corporate property for purposes at variance with its declared uses. This relation prevents the three years statute of limitations from applying. *Besseliew v. Brown*, 177 N. C., 65; *Hilton v. Gordon*, 177 N. C., 342; *Steel Co. v. Hardware Co.*, 175 N. C., 450; *Bassett v. Cooperage Co.*, 188 N. C., 511; *Johnston v. Overman*, 55 N. C., 182; *Blount v. Robeson*, 56 N. C., 73; *Davis v. Cotten*, 55 N. C., 430; *West v. Sloan*, 56 N. C., 102.

The lease in controversy provides that, "the party of the second part (J. L. Nicholson) is to have full control of the operation of said hospital, and he is to attend to employing and paying nurses, etc., and he is to attend to buying all supplies and equipment used by him in the operation of said hospital, under this lease. The said party of the second part is to manage and look out for said property the same as if it were his own, except, of course, that he is not to sell or in any way encumber any of said property."

We are, therefore, of the opinion that the pleaded three years statute of limitations is not applicable.

The ten years statute of limitations would be applicable if there were a sufficient basis in fact. *Norcum v. Savage*, 140 N. C., 472, 474; *Norton v. McDevit*, 122 N. C., 759; *Latham v. Latham*, 184 N. C., 56; *Sexton v. Farrington*, 185 N. C., 339; *Little v. Bank*, 187 N. C., 1; *Lynch v. Johnson*, 171 N. C., 611; *Phillips v. Lumber Co.*, 151 N. C., 520.

Therefore, let this case be remanded to the Superior Court of Beaufort County, to the end that a further trial may be had herein, in accordance with the former opinion of this Court in *Hospital v. Nicholson*, 189 N. C., 44.

Reversed and remanded.

SALLIE D. NICHOLSON v. PLUMMER A. NICHOLSON, JR., A MINOR, BY HIS GUARDIAN AD LITEM, JOHN H. BONNER.

(Filed 16 September, 1925.)

Wills—Statutes—Descent and Distribution—Dower—Heirs—"Issue."

Where the father's will leaves his estate consisting of lands to his wife and to a child *in ventre sa mere* at the time the will was written, and the child thus provided for has been born in the lifetime of the father, but has predeceased him; and another child is born of the marriage and the mother and the child survive the father: *Held*, under the rule of descent, C. S., 4169, the son unprovided for by the will living at the time of his father's death, will inherit the real estate of which his father dies seized, subject to the dower of the widow, his mother.

APPEAL by defendant from *Bond, J.*, from judgment rendered 23 July, 1925, from BEAUFORT.

Small, MacLean & Rodman for plaintiff.
John H. Bonner for defendant.

CLARKSON, J. The late B. B. Nicholson, a lawyer by profession, left a last will and testament dated 5 April, 1904, which provides, "I will and bequeath and devise my entire real and personal property of all kind whatsoever to my beloved wife, Sallie D. Nicholson and our child (unborn), with one request, etc."

The child referred to at that time, Blake B. Nicholson, Jr., was born and lived to the age of nine years, but died before his father. A second child, Plummer A. Nicholson, Jr., represented herein by his guardian *ad litem*, John H. Bonner, was born later and survived his father, and is the only heir at law. The testator died in August and his will was probated in September, 1917.

Plaintiff contends that she is the widow of B. B. Nicholson and took one-half of the real property under the will and Plummer A. Nicholson, Jr., one-half thereof. On the other hand, it is contended by the guardian *ad litem* of Plummer A. Nicholson, Jr., that in accordance with the statute B. B. Nicholson died intestate as to the infant defendant, having made no provision for him, and that he is the owner and entitled to all of the property of which his father died seized and possessed, subject to the dower of the plaintiff his widow.

These contentions require us to interpret the statute, C. S., 4169, which is as follows:

"Children born after the making of the parent's will, and whose parent shall die without making any provision for them, shall be entitled to such share and proportion of the parent's estate as if he or she had died intestate, and the rights of any such after-born child shall be a lien

on every part of the parent's estate, until his several share thereof is set apart in the manner prescribed in this chapter."

B. B. Nicholson having died leaving a widow and an after-born son for whom he made no provision in his will; the statute says that this son shall be entitled to such share and proportion of the parent's estate as if he had died intestate.

Rules of descent, C. S., 1654:

"Rule 1. *Lineal descent.* Every inheritance shall lineally descend forever to the issue of the person who died last seized, entitled or having any interest therein, and shall not lineally ascend, except as hereinafter provided."

For definition of "issue" see *Edmondson v. Leigh,* 189 N. C., p. 201.

Under the statute, so far as Plummer A. Nicholson, Jr., is concerned, B. B. Nicholson died intestate, and his real estate of which he died seized will descend to his "issue." His only issue was Plummer A. Nicholson, Jr., and his father having made no provision in the will for him, the will is inoperative and he is the sole issue or heir, subject to the widow's dower.

In the case of *Flanner v. Flanner,* 160 N. C., p. 126, Lizzie H. Flanner made a will as follows: "I give, grant and devise to my beloved husband, William B. Flanner, all my property of every kind, real, personal and mixed." The will was made 16 May, 1891. On 7 February, 1892, William B. Flanner, Jr., was born of the marriage and thereafter Lizzie H. Flanner died. The Court in that case held that no provision was made for the child. See *Rawls v. Ins. Co.,* 189 N. C., 368.

In the present case the record states that the estate consists largely of land, there being no personal estate of any value.

We think the law clear under the statute. Plummer A. Nicholson, Jr., inherits a fee-simple title to the land, subject to the dower right of plaintiff.

For the reason given, the judgment below is

Reversed.

J. R. HILL ET AL. v. BOARD OF COMMISSIONERS OF GATES COUNTY.

(Filed 16 September, 1925.)

Constitutional Law—Local Laws—Due Process—Taxation—Uniformity.

A public-local law authorizing the commissioners of a county to take over a specified highway within the county, constituting one of the principal highways within the county, connecting two important State highways, transferring to the said commissioners the bridges of the various townships for their care and supervision, is not violative of

Art. II, sec. 29, of our Constitution against direct legislation by local, private or special act, nor the taking of property without due process of law, Art. I, sec. 17; nor the pledging of the county's faith or credit without the approval of the voters, etc., Art. VII, sec. 7; nor against the uniformity rule, Art. VIII, sec. 9: *Semble*, such powers are declaratory or supplemental to the general statute law, and valid.

VARSER, J., not sitting.

APPEAL by plaintiffs from *Sinclair, J.*, at December Term, 1924, of GATES.

Civil action, heard upon demurrer and facts agreed, to enjoin the defendant, Board of Commissioners of Gates County, from proceeding, under chapter 46, Public-Local Laws, Extra Session, 1924, "to take over the highway leading from Mitchell's Fork via Gatesville, Buckland, and Gates to the Virginia State line near Somerton, Virginia, and to relieve the townships through which the highway traverses from the burden of building, reopening, and maintaining the same, and also to take over all the bridges of the various townships, the said bridges to be built and maintained at the expense of the county." Authority is also given in said act to levy a special tax on all the property in the county, not to exceed fifteen cents on the $100 valuation, for the purpose of carrying out the provisions of the statute.

From a judgment sustaining the demurrer and dismissing the action, the plaintiffs appeal.

McMullen & Leroy for plaintiffs.

T. W. Costen, A. P. Godwin, and Ehringhaus & Hall for defendant.

STACY, C. J. The basis of the present action is the alleged unconstitutionality of chapter 46, Public-Local Laws, Extra Session, 1924.

It is contended, in the first place, that the act in question is violative of Article II, sec. 29, of the Constitution, which provides, in part, as follows: "The General Assembly shall not pass any local, private, or special act or resolution . . . authorizing the laying out, opening, altering, maintaining, or discontinuing of highways, streets, or alleys."

In *Brown v. Comrs.*, 173 N. C., 598, it was said that the prohibition of this section of the Constitution was against direct legislation to accomplish the things therein enumerated by any local, private, or special act of the General Assembly. Such is not the purpose or effect of the statute now before us. The designated highway is one of the principal thoroughfares in Gates County, and connects two important State highways, numbers 30 and 32, which themselves traverse the county and several others. Furthermore, all the bridges of the various townships are transferred to the care and supervision of the county commissioners.

We do not find the act in conflict with Article II, sec. 29, of the Constitution. *S. v. Kelly,* 186 N. C., 365, and cases there cited.

Nor can it be held invalid, according to plaintiffs' contention, as violative of the provisions of the Constitution (1) against taking property without due process of law (Article I, sec. 17) or (2) pledging the faith of the county, except for a necessary expense, without a vote of a majority of the qualified electors therein (Article VII, sec. 7), or (3) levying a tax in disregard of the rule of uniformity in taxation (Article VII, sec. 9).

Plaintiffs have proceeded on the theory that the act authorizes a county tax for local township roads; whereas, from the facts agreed, it appears that the designated road forms an essential part of a county-wide scheme, affording improved highway facilities to every township in the county and benefiting all.

Again, it would seem that the act here challenged is only declaratory of, or supplementary to, the powers given the defendant under the general law. *Road Com. v. Comrs.,* 188 N. C., 362. Such would apparently save its constitutionality.

The exceptions are not allowed.

Affirmed.

VARSER, J., not sitting.

J. I. AND H. H. PERRY v. MATTHEW PERRY.

(Filed 16 September, 1925.)

Ejectment — Leases — Landlord and Tenant — Evidence—Questions for Jury—Title.

While the defendant in summary ejectment may not deny the title to the property of the one under whom he obtained possession while continuing therein, it is competent for him to show by his evidence that in fact he rented from and entered possession under another.

APPEAL by defendant from *Cranmer, J.,* at March Term, 1925, of PASQUOTANK.

Summary ejectment between plaintiffs, alleged landlords, and defendant, alleged tenant, and from a judgment on a jury verdict for plaintiffs, the defendant appeals.

The defendant's appeal challenges the exclusion of evidence offered by him tending to show that the defendant rented the *locus in quo* from another, and that there was a dispute as to the title, and that defendant's wife, as well as one Bundy, claimed an interest in this land. There was no motion to dismiss, for that title to land was in controversy.

W. L. Small, Ehringhaus & Hall for plaintiffs.
Aydlett & Simpson for defendant.

VARSER, J. In summary ejectment there is, of course, only one main issue involved, and that is tenancy and the holding over. *McDonald v. Ingram,* 124 N. C., 272; *McIver v. R. R.,* 163 N. C., 545. However, it naturally follows that the summary remedy in ejectment provided by statute is restricted to cases in which the relation between the parties is that of landlord and tenant. *McIver v. R. R., supra; Hauser v. Morrison,* 146 N. C., 248; *McCombs v. Wallace,* 66 N. C., 481; *Hughes v. Mason,* 84 N. C., 472; *Fertilizer Works v. Aiken,* 175 N. C., 398; *Hargrove v. Cox,* 180 N. C., 362.

The defendant denies that this relation exists. He expressly testifies that he did not rent the lands from the plaintiffs. The evidence offered is not competent to show title in another, if the relation of landlord and tenant does exist. This testimony as to a rental by defendant from Bundy, in 1923 and 1924, and as to a controversy between the Perrys and defendant's wife is competent to be considered by the jury on the issue as to the rental contract, as a circumstance, in determining whether there was such a contract. It is also competent as corroborative of the defendant's testimony. These are the only purposes for which it is competent. Thus restricted, the testimony ought to have been admitted.

Of course, as stated in *Davis v. Davis,* 83 N. C., 71, if the defendant did enter as tenant of the plaintiffs or became such after entry, then he is estopped to deny the plaintiffs' title (16 R. C. L., 469), or to assert title in himself (16 R. C. L., 657) until he has restored the possession to the plaintiffs, but he may contest the issue of tenancy by any competent evidence.

Therefore, let there be a

New trial.

G. E. FERRELL v. NORFOLK SOUTHERN RAILROAD COMPANY.

(Filed 16 September, 1925.)

Negligence—Railroads—Livestock — Turkeys—Prima Facie Case—Burden of Proof.

Where a railroad train runs into, kills or injures livestock and turkeys of the owner along its tracks, and he brings his action for damages within the statutory six months, the prima facie case of negligence raised by the statute is sufficient to take the case to the jury, but does not change the burden of proving the issue of negligence from the plaintiff. C. S., 3482.

FERRELL *v.* R. R.

APPEAL by defendant from *Cranmer, J.*, at April Term, 1925, of CURRITUCK.

Civil action to recover damages for the negligent injury and killing of plaintiff's livestock and turkeys by defendant's engines and cars. Damages amounting to $262.50 were awarded for animals killed more than six months prior to the institution of the action and $44.50 for animals killed within six months next immediately preceding the institution of the action. C. S., 3482.

Judgment on the verdict for plaintiff, from which defendant appeals, assigning errors.

W. L. Small for plaintiff.
Thompson & Wilson for defendant.

STACY, C. J. There is no error appearing on the record with respect to the damages awarded for plaintiff's cattle, hogs, and turkeys injured or killed by the defendant's engines or cars more than six months prior to the institution of the action, but in regard to the amount awarded for livestock injured or killed within six months next immediately preceding the institution of the action, we think the trial court erred in charging the jury that, under C. S., 3482, "there is a presumption of negligence, and the burden is on the railroad company to rebut the presumption." The language of the statute is as follows:

"When any cattle or other livestock shall be killed or injured by the engine or cars running upon any railroad, it shall be *prima facie* evidence of negligence on the part of the railroad company in any action for damages against such company: *Provided,* that no person shall be allowed the benefit of this section unless he shall bring his action within six months after his cause of action shall have accrued."

True, in some of the earlier decisions on the subject, it was said that when suit for damage or injury to cattle or other livestock occasioned by the engines or cars of a railroad company was brought within six months after plaintiff's cause of action accrued, this statute raised a presumption of negligence and cast upon the defendant the burden of rebutting such presumption (*Bethea v. R. R.*, 106 N. C., 279; *Carlton v. R. R.*, 104 N. C., 365), but it is now the established rule, as settled by the later and prevailing cases, that "*prima facie* evidence of negligence" means no more than evidence sufficient to carry the case to the jury, and to justify, but not compel, a verdict as for a negligent wrong. *Hunt v. Eure,* 189 N. C., 482; *Speas v. Bank,* 188 N. C., 524; *Austin v. R. R.*, 187 N. C., 7; *McDowell v. R. R.*, 186 N. C., 571; *White v. Hines,* 182 N. C., 276; *S. v. Wilkerson,* 164 N. C., 431.

We are constrained to hold, therefore, that so many of the earlier decisions as are in apparent or actual conflict with our more recent expressions on the subject, and to the extent thereof, must be understood as modified to such extent by the later decisions. *McDowell v. R. R., supra; White v. Hines, supra.* The question was fully considered, and the principles again stated in the recent cases above cited, to the end that the contrariety of expression appearing in some of the opinions might be corrected and the matter set at rest. We must adhere to the conclusions reached in these later cases.

The error as indicated, however, viewed in the light of the admissions made on the hearing and from what appears on the record, would seem to necessitate only a partial new trial. This the defendant is entitled to, and it is so ordered.

Partial new trial.

S. W. WORTHINGTON AND KIRBY WOODARD, SUCCESSORS TO THE QUINN-McGOWAN FURNITURE COMPANY, v. GILMERS, INCORPORATED.

(Filed 16 September, 1925.)

Actions—Parties—Corporations—Receivers.

Where it appears in an action that the indebtedness sought to be recovered was claimed to be due a corporation, and that the suit was instituted by the individual stockholders, a judgment as of nonsuit is properly entered, though proceedings in dissolution of the corporation were being had, C. S., 1182, the proper party plaintiff being the corporation or a receiver appointed therefor.

APPEAL by plaintiffs from *Sinclair, J.,* at May Term, 1925, of WILSON.

Plaintiffs sued the defendant for certain moneys collected from common carriers on claims filed by the Quinn-McGowan Furniture Company, a corporation. From a judgment as upon nonsuit, plaintiffs appealed.

The evidence tended to show that plaintiffs are the owners of all the capital stock of Quinn-McGowan Furniture Company, a corporation, and that proceedings were had on or about 20 September, 1920, to dissolve this corporation under C. S., 1182.

This action was instituted 21 June, 1923.

That certain properties were sold by Quinn-McGowan Furniture Company to the defendant, as evidenced by bill of sale dated 2 August, 1920, and that these claims against two railroads for damages to furniture were not included in this sale, but that defendant did, after 2 August, 1920, and before 21 June, 1923, collect these claims in the sum of $1,885.62.

The plaintiffs' evidence further tended to show that these claims were due to the Quinn-McGowan Furniture Company.

To the exclusion of the evidence of the witness Meares, that the account receivable, as shown on the current ledger, and the sale to Gilmers, did not include any item of freight claims, on the grounds that the bill of sale and books therein referred to were the best evidence, and to the nonsuit, plaintiffs excepted and appealed.

S. G. Mewborn for plaintiffs.
Woodard & Rand and Connor & Hill for defendant.

PER CURIAM. There was no notice given to produce the books, and their loss was not proved. They were not collateral, but are clearly within the rule announced in *Ivey v. Cotton Mills*, 143 N. C., 189; *Murchison v. McLeod*, 47 N. C., 239; *Mahoney v. Osborne*, 189 N. C., 445.

The freight claims were filed by the Quinn-McGowan Furniture Company, a corporation, in its name, and not in the names of its stockholders. There is no claim that the corporation ever transferred them to the plaintiffs. The corporation, after the dissolution proceedings, remained in existence three years. C. S., 1193.

The stockholders cannot maintain this action in their individual capacity upon the allegations in this complaint. We view the evidence in its most favorable light for plaintiffs on a motion to nonsuit, but this rule cannot supply the proper plaintiff.

The corporation itself, or a receiver thereof, is the proper party to sue for its property. *Moore v. Mining Co.*, 104 N. C., 534; *Merrimon v. Paving Co.*, 142 N. C., 539; *Hawes v. Oakland*, 104 U. S., 450.

The judgment appealed from is

Affirmed.

O. J. NYE AND WIFE, SALLIE ELIZABETH NYE, v. SUSAN D. WILLIAMS.

(Filed 23 September, 1925.)

Contracts—Breach—Demurrer — Motions—Statutes—Deeds and Conveyances.

In an action for breach of contract for failure of defendant to insert certain restrictions as to character of buildings, etc., to be erected on lots sold in a general development plan, wherein all purchasers, of which the plaintiff was one, were to have an advantage or benefit, the complaint alleging the breach of such contract in specific detail is not demurrable, and where more definiteness of allegation is sought, the remedy should be pursued by motion to make the complaint more definite and specific. C. S., 537.

APPEAL by defendant from *Sinclair, J.*, at chambers, 24 June, 1925. From EDGECOMBE.

Action by plaintiffs against defendant for breach of contract to insert restricted covenants in deeds for all city lots sold in the city of Rocky Mount known as "Edgemont."

The defendant demurred, and from a judgment overruling the demurrer she appealed.

Plaintiffs complained as follows:

"1. That several years ago the defendant and her sister, Nannie E. Harper, owned a large tract of land near the city limits and partly within the then city limits of the city of Rocky Mount, Edgecombe County, and planned and formed a definite scheme to subdivide the same and sell the same off into lots according (to) the said scheme for strictly and exclusively a high-class residential property, and in the pursuance of the said scheme and plan had the said property subdivided, all the said property then being designated as Edgemont. The said property was mapped or platted accordingly, and the said map is registered in Map Book No. 1, at p. 58, of Edgecombe registry; they went further and extensively published notices of sale in which all the said exclusive features of the exclusive settlement were set out; they even went further and had fully printed forms of the deed to be made containing practically all the exclusive features and conditions. All sales were made, in so far as plaintiffs can ascertain, strictly in accordance with the said scheme, other than the ones hereinafter referred to, and which do peculiar damage to the plaintiffs.

"In accordance with the said scheme and sale, many valuable improvements were placed, many handsome streets laid out and improved, and many handsome and commodious residences were erected thereon, and the same is now a populous and high-class residential section of the said city.

"2. That in the course of the development of the said scheme, and in the course of the sales, said Susan D. Williams and the said Nannie D. Harper, who are sisters, conveyed to their father, J. P. Daughtry, who plaintiffs are informed had a right of curtesy in all the said lands, lots Nos. 12 and 13, block 43, as shown on the said map, and subsequently he conveyed the said two lots to these plaintiffs, the said deeds being registered in Book 200, at p. 99, and in Book 223, at p. 162, both of which deeds and the said map are asked to read as a part hereof.

"3. That shortly after plaintiffs purchased the said two lots they erected a residence thereon, complying with the said scheme of development of Edgemont, as did scores of other purchasers.

"4. That after plaintiffs had erected their new residence on said lots, the defendant, in violation of the said plan of development, and after

she had sold practically all the more valuable lots in the section, sold and conveyed to one A. R. Bobbitt lot No. 14 of the said block 43, which is adjacent to plaintiffs' lots, all of which front the same street—namely, Cokey Road. In executing the deed to the said Bobbitt in violation of her agreement, she left out several of the so-called restrictions and reservations of the said deeds and scheme, and especially did she leave out items three and four of the said restrictions.

"5. That the defendant solemnly obligated herself to the plaintiffs not to make any conveyance to any other person unless the conveyance on the said Edgemont should contain all the restrictions and reservations hereinbefore stated, but in violation of the said agreement, and after plaintiffs had purchased said lots and erected their home thereon, violated the said agreement in the execution of the said deed to the said Bobbitt.

"6. That almost immediately after the said Bobbitt had thus obtained his deed in fee not containing the said reservations and restrictions he erected a building thereon which was much inferior to the one, or which cost much less than the one, which should have been required by the restrictions which defendant obligated to put in all deeds, but left out of his, and in addition thereto he erected the said building jam up to plaintiffs' line and jam up to the said Cokey Road, which road or street both lots front, and he should not, under the said scheme of development, have built nearer the said street than twenty feet, as all other deeds required, and as all other buildings on the said street and in the whole of Edgemont were built.

"7. That by reason of the construction of the said building in front of plaintiffs' building, plaintiffs' view is obstructed, and the breezes which cooled plaintiffs' front porch and other parts of the residence are obstructed, and in many other ways are plaintiffs inconvenienced and damaged that they would not have been if the deed had been executed with the restrictions and reservations according to the said scheme of development, and plaintiffs have been thereby damaged in the sum of $1,000."

The defendant demurred, for that the complaint does not state facts sufficient to constitute a cause of action.

The restricted covenants set out in the deed, referred to in paragraph two of the complaint, are as follows:

"First—The party of the second part agrees not to sell the property hereinbefore described to persons of African descent until a period of twenty years from the date of this deed shall have expired.

"Second—That no liquors or ardent spirits are to be sold upon the property hereinbefore mentioned until a period of twenty years from the date of this deed shall have expired.

"Third—That no dwelling-house or store-house shall be erected on the property hereinbefore conveyed to cost less than $1,500 until a period of twenty years from the date of this deed shall have expired.

"Fourth—That no dwelling-house, store-house, or other building structure shall be erected on the property hereinbefore conveyed nearer than twenty feet to the main street on which said property faces until a period of ten years from the date of this deed shall have expired.

"Fifth—That the layout of the lots as shown on the plan or plot of 'Edgemont' shall be adhered to, and no scheme of subdividing lots or facing main buildings on lots in other directions than as indicated by said plan shall be permitted until a period of fifteen years from the date of this deed shall have expired, provided that this covenant or agreement shall not apply to the grantors herein when making original conveyances of said property.

"Sixth—That not more than one residence or main structure shall be erected on any one lot as shown on said plan until a period of fifteen years from the date of this deed shall have expired."

The following judgment was rendered upon the demurrer:

"This cause coming on to be heard before his Honor, Judge N. A. Sinclair, in chambers at Wilson, N. C., this 24 June, 1925, upon complaint and demurrer after notice having been given to both parties of such hearing, and being heard, and the plaintiff comes into court and withdraws the allegations of the complaint numbered 8 and 9, and takes a nonsuit as to the matters alleged in paragraph 8 of the said complaint, and as to the demurrer that the complaint in all other respects does not state a cause of action, the demurrer is overruled, and the defendant is allowed to answer as provided by statute."

E. B. Grantham for plaintiffs.
Jos. B. Ramsey and John Kerr, Jr., for defendants.

VARSER, J. The sole question presented in this case is whether the complaint alleges an actionable breach of the contract.

This case is readily distinguishable from actions in equity to enforce restricted covenants growing out of either specific contracts or a general scheme or plan of development. *Davis v. Robinson,* 189 N. C., 597. No equitable relief in the instant case is sought, but the plaintiffs allege specifically, in paragraph five of the complaint, that the defendant solemnly obligated herself to the plaintiff not to make any conveyance to any other person for lands in Edgemont unless the conveyance should contain all the restricted covenants which appear in the Daughtry deed, under which plaintiffs had purchased and built a residence, and that there was a breach of this solemn obligation.

In *Davis v. Robinson, supra,* this Court held that such restrictions were not enforceable by injunctive relief unless they appeared in the deeds of the parties against whom the equitable relief was sought or in their chain of title. Of course, this did not affect the right to exercise the right to resort to the equitable doctrine of correction to insert the covenants upon proper proof of all the elements necessary. But *Davis v. Robinson, supra,* does not hold that a landowner could not by contract bind herself to insert restrictive covenants in all other deeds for lots subsequently sold when founded upon sufficient consideration. Construing the complaint as required by C. S., 535; *Hartsfield v. Bryan,* 177 N. C., 166; *Parker v. Parker,* 176 N. C., 198; *Muse v. Motor Co.,* 175 N. C., 466; *Wyatt v. R. R.,* 156 N. C., 307; *Brewer v. Wynne,* 154 N. C., 467; *Ludwick v. Penny,* 158 N. C., 104; *Stokes v. Taylor,* 104 N. C., 394; *Gregory v. Pinnix,* 158 N. C., 147; *R. R. v. Main,* 132 N. C., 445; *Phifer v. Giles,* 159 N. C., 142; *McNinch v. Trust Co.,* 183 N. C., 33, 41, we must hold that the complaint is not demurrable unless it is wholly insufficient. *Womack v. Carter,* 160 N. C., 286. Under this rule the complaint does set out a cause of action in the light of the allegations contained in paragraph five thereof.

If the complaint is not sufficiently specific in order to inform the defendant, so that she may prepare her defense intelligently, the remedy is not by demurrer, but by a motion addressed to the trial court to make the complaint more definite and specific. *Bank v. Duffy,* 156 N. C., 83; *Womack v. Carter, supra;* C. S., 537.

We forbear any discussion of the facts in this case, in order that no prejudice may result upon the trial. We expressly limit this opinion to the holding that the complaint is not demurrable.

The judgment appealed from is

Affirmed.

STATE v. H. D. GRIFFIN.

(Filed 23 September, 1925.)

1. Appeal and Error—Newly Discovered Evidence—Motions—New Trials.

In criminal actions, the Supreme Court will deny a motion for a new trial made upon the ground of newly discovered evidence.

2. Evidence—Criminal Law—Courts—Appeal and Error.

Where upon the trial of a criminal action a witness is permitted to testify to the admissions made to him by one of several defendants as to his guilt, and the witness states the names of others participating in the offense charged, it is within the power and duty of the trial judge

to exclude the evidence as to the other defendants upon trial, by such remarks as to make it nonprejudicial as to them, and where he has sufficiently done so, it may not be held for error on appeal.

3. Constitutional Law — Punishment — Statutes — Discrimination—Sentence—Court's Discretion—Appeal and Error.

Upon conviction of the criminal offense inhibited by C. S., 4210, a sentence of the court for a period within that allowed by statute will not be considered on appeal as a cruel or unusual punishment against the provision of our Constitution, Art. I, sec. 14, or discriminatory against the principal actor in committing the crime, when the others participating therein to a less extent have been sentenced for shorter terms, the sentences imposed being left largely in the discretion of the trial court, and in the absence of an abuse of this discretion not reviewable on appeal.

APPEAL by defendant from *Sinclair, J.*, at May Special Term, 1925, of MARTIN.

The defendant and two others were convicted of a breach of section 4210 of the Consolidated Statutes and another defendant of a breach of section 4211. The defendant appealed and now presents two assignments of error.

The first relates to the admission of evidence. E. D. Dodd, a witness for the State, testified to the following conversation between him and J. O. Bullock, one of the convicted defendants, who, while imprisoned, inquired of the witness when he could get out of jail: "I told him I had no idea in the world; that I knew nothing about court procedure or jail cases, and that I came here at the request of his brother; and I said: 'If you want to make a clean-breast statement of this thing, and you know anything about it and will tell it, I will ask Mr. Gilliam to do what he can for you'; and then he went ahead and told what he said was all he knew. He said he was in it; that he was sorry, but he was in it; and then he gave the names of those who were in it.

"Q. All right, who did he say was in it?

"Counsel for defendant object.

"The Court: I will exclude it. I will not permit him to name any defendant on trial. I will permit him to give the names of all of those he says Bullock gave him, with the exception of the defendants in this case, and I instruct the jury not to consider it in any respect as evidence against those now on trial except as against Bullock himself.

"The same witness then continued: 'Shall I read the names as I have them here except the ones on trial?'

"Counsel: Will you give us an exception to that statement?

"The Court: No, sir; I will not. The witness asked me a question privately; the jury did not hear it, and it is not a part of the record. Gentlemen of the jury, there is no evidence before the court that any of these men on trial had their names on this list at all.

"These are the names as he gave them to me: Roy Gray, James H. Gray, Louis Johnson, Grady Smith, Edgar Johnson, Sherwood Robinson, Elder Stone, Lester Edmonson, Lory Croom, young boy Griffin—he didn't know his name; said he didn't—Thomas Harrell. I am giving you exactly what he gave to me. Hugh Robinson was to go, but he didn't know whether he went or not.

"Solicitor: Don't give the balance of them.

"Witness: Yes, sir; the others have bearing on these defendants.

"Counsel: I think we would be entitled to have those remarks reduced to the record. He said the rest of it bears on these defendants.

"The Court: Gentlemen of the jury, there is no suggestion that any of the defendants except Bullock had their names on that list at all.

"Motion by defendant to strike out the evidence. Motion denied; defendant excepted."

The second assignment involves the question whether the punishment imposed is cruel or unusual, the defendant having formally excepted to the judgment pronounced.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

J. D. Paul, H. W. Stubbs, and H. C. Carter for defendant.

ADAMS, J. Pending the appeal, and immediately before the argument, the defendant filed a written motion for a new trial on the ground of newly discovered evidence. The motion, of course, must be denied. In *S. v. Lilliston,* 141 N. C., 857, it is said that because the Court has no jurisdiction it has never entertained a motion of this kind, and that by uniformity of practice and decision the point has been definitely settled against the defendant's present contention. There are many cases to this effect. *S. v. Flood, post* (*per curiam*); *S. v. Hartsfield,* 188 N. C., 357; *S. v. Williams,* 185 N. C., 643, 664; *S. v. Jenkins,* 182 N. C., 818; *S. v. Ice Co.,* 166 N. C., 403; *S. v. Arthur,* 151 N. C., 653; *S. v. Turner,* 143 N. C., 641; *S. v. Register,* 133 N. C., 747; *S. v. Council,* 129 N. C., 511; *S. v. Edwards,* 126 N. C., 1051; *S. v. Rowe,* 98 N. C., 629; *S. v. Starnes,* 97 N. C., 423; *S. c.,* 94 N. C., 973.

In reference to the exceptions concerning the admission of evidence, it is to be noted that this Court has frequently approved the withdrawal of incompetent testimony and the judge's direction to the jury not to consider it. "It is undoubtedly proper and in the power of the court to correct a slip by withdrawing improper evidence from the consideration of the jury or by giving such explanation of an error as will prevent it from misleading a jury"—*Ruffin, C. J.,* in *McAllister v. McAllister,* 34 N. C., 184. See, also, additional citations in *S. v. Stewart,*

189 N. C., 340. But in the case before us the learned judge did not admit incompetent evidence; if there was inadvertence or error, it was that of the witness. His Honor was alert and vigilant to see that any remark prejudicial to the defendant or even susceptible of misconstruction should not be considered by the jury. He carefully restricted the evidence to the question of Bullock's guilt and gave an explicit instruction that there was no suggestion that the name of any other defendant was on the list of names furnished by Bullock to Dodd. If the trial judge may correct his own inadvertence *a fortiori* may he correct the inadvertent or improper statement of a witness upon the stand. If it were otherwise, orderly procedure and the administration of justice would be well nigh impossible. 38 Cyc., 1315; Jones on Evidence, sec. 815; *S. v. Miller,* 75 N. C., 73; *S. v. Spivey,* 151 N. C., 676, 681.

The remaining exception relates to the constitutional inhibition against cruel or unusual punishment. It is provided that upon conviction of the crime denounced in C. S., 4210, the offender shall suffer imprisonment in the State's prison for not less than five nor more than sixty years; and under this provision and by virtue of this authority the defendant was sentenced to hard labor in the penitentiary for the determinate period of thirty years. Other defendants received sentences ranging in duration from six to ten years; and the defendant insists that the quantum of punishment meted out to him is discriminatory and a palpable violation of the constitutional provision. There is evidence, however, tending to show that the maim charged in the indictment (the most aggravated defined in the statute) was maliciously inflicted by the defendant; and this, no doubt, was considered by his Honor when judgment was pronounced.

In 1688 the Bill of Rights (1 Will. & Mar., sess. 2, c. 2), after reciting the various ways in which James II had infringed upon the liberties of the subject, declared in section 10: "Excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Ridge's Constitutional Law of England, 9. The Federal Constitution contains a similar provision, the Eighth Amendment substituting the word "shall" for the word "ought." In the State Constitution of 1776 the language is, "That excessive bail should not be required, nor excessive fines imposed, nor cruel nor unusual punishments inflicted." Declaration of Rights, sec. 10. This section, with a slight change of phraseology, appears in the Constitution of 1868, Art. I, sec. 14.

In *Wilkerson v. Utah,* 19 U. S., 130, 25 Law Ed., 345, it is said, "Difficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishment shall not be inflicted"; and in *Weems v. United States,* 217

U. S., 349, 54 Law Ed., 793, *Mr. Justice McKenna* remarked, "What constitutes a cruel and unusual punishment has not been exactly decided." To the same effect is the language of *Mr. Justice Reade*: "What the precise limit is cannot be prescribed. The Constitution does not fix it, precedents do not fix it, and we cannot fix it, and it ought not to be fixed. It ought to be left to the judge who inflicts it under the circumstances of each case," etc. *S. v. Driver,* 78 N. C., 423, 429. In respect to the measure of punishment regard should always be had to the circumstances developed on the trial, since the presiding judge usually has opportunity to acquire accurate information. *S. v. Pettie,* 80 N. C., 267.

As we have indicated above, the maximum punishment prescribed by the statute is imprisonment for a term not exceeding sixty years. With respect to such statutory provision, in *Weems v. United States, supra,* it is said: "We disclaim the right to assert a judgment against that of the Legislature, of the expediency of the laws, or the right to oppose the judicial power to the legislative power to define crimes and fix their punishment, unless that power encounters in its exercise a constitutional prohibition. In such case, not our discretion, but our legal duty, strictly defined and imperative in its direction, is invoked. Then the legislative power is brought to the judgment of a power superior to it for the instant. And for the proper exercise of such power there must be a comprehension of all that the Legislature did or could take into account—that is, a consideration of the mischief and the remedy. However, there is a certain subordination of the judiciary to the Legislature. The function of the Legislature is primary, its exercise fortified by presumptions of right and legality, and is not to be interfered with lightly, nor by any judicial conception of its wisdom or propriety. They have no limitation, we repeat, but constitutional ones, and what those are the judiciary must judge. We have expressed these elementary truths to avoid the misapprehension that we do not recognize to the fullest the wide range of power that the Legislature possesses to adapt its penal laws to conditions as they may exist and punish the crimes of men according to their forms and frequency."

In *S. v. Manuel,* 20 N. C., 144, 159, 161, *Judge Gaston* expressed a similar opinion: "The right of the Legislature to prescribe the punishment of crimes belongs to them by virtue of the general grant of legislative powers. It is a power to uphold social order by competent sanctions. Unless they be restricted, and so far only as they are restricted by constitutional prohibitions, it is a power in the Legislature to accomplish the end by such means as in their discretion they shall judge best fitted to effect it. . . . Now, there are great, if not insuperable, difficulties in a court undertaking to pronounce any fine excessive which

the Legislature has affixed to an offense. It must be admitted that the language of this section of the Bill of Rights is addressed directly to the judiciary for the regulation of their conduct in the administration of justice. It is the courts that require bail—impose fines—and inflict punishments—and they are commanded not to require excessive bail—not to impose excessive fines—not to inflict cruel or unusual punishments—and it would seem to follow that this command is addressed to them only in those cases where they have a discretion over the amount of bail, the quantum of the fine, and the nature of the punishment. No doubt the principles of humanity sanctioned and enjoined in this section ought to command the reverence and regulate the conduct of all who owe obedience to the Constitution. But when the Legislature, acting upon their oaths, declare the amount of bail to be required, or specify the fines to be imposed, or prescribe the punishments to be inflicted in case of crime, as the reasonableness or excess, the justice or cruelty of these are necessarily questions of discretion, it is not easy to see how this discretion can be supervised by a co-ordinate branch of the government. Without attempting a definite solution of this very perplexing question, it may at least be safely concluded that unless the act complained of (which it would be almost indecent to suppose) contains such a flagrant violation of all discretion as to show a disregard of constitutional restraints, it cannot be pronounced by the judiciary void because of repugnancy to the Constitution."

The judgment pronounced being within the limits of the law was also in the discretion of the presiding judge, and is not subject to review in this Court. *S. v. Miller,* 94 N. C., 904; *S. v. Woodlief,* 172 N. C., 885.

We find

No error.

N. E. SALEEBY v. C. M. BROWN AND WIFE, HELEN D. BROWN, AND STEPHEN C. BRAGAW, TRUSTEE, BANK OF WASHINGTON, INTERPLEADER; SAVINGS & TRUST COMPANY, INTERPLEADER; W. GRAY WILLIS, INTERPLEADER.

(Filed 23 September, 1925.)

1. Mortgages — Registration — Payment—Cancellation—Resuscitation—Liens.

Where the mortgagor has paid a registered mortgage, and the mortgage has been marked "Paid and satisfied," and the mortgagor acknowledges that the note has been "canceled and destroyed" the mortgagor by endorsement thereon or otherwise cannot resuscitate the same in favor of another who has loaned him money, or use the same as collateral therefor, and make it prior in lien to judgment creditors.

2. Courts—Pleadings—Amendments—Appeal and Error.

A motion to amend pleadings is addressed to the sound discretion of the trial judge, and his refusal therefor is not reviewable on appeal.

APPEAL by plaintiff from *Cranmer, J.*, and a jury, at February Term, 1925, of BEAUFORT.

This is a civil action brought by plaintiff against the defendants to recover certain funds in the hands of Stephen C. Bragaw, trustee, also a defendant. Facts material for decision of the case:

(1) On or about 24 June, 1919, the defendants, C. M. Brown and wife, Helen D. Brown, executed a note for $12,500, secured by mortgage on certain land to the Washington Building & Loan Association. Mortgage recorded in register of deeds office for Beaufort County, Book 227, p. 538.

(2) On or about 15 May, 1920, the same parties executed notes for $15,000 secured by deed in trust to Stephen C. Bragaw, trustee on the same property described in the Building & Loan mortgage. This deed in trust was recorded in the register of deeds office for Beaufort County, Book 223, p. 548. This deed in trust, although of later date, was recorded prior to the Building & Loan mortgage and constituted a first lien on the property.

The plaintiff alleges that he "is the owner and holder of the mortgage from the defendants, C. M. Brown and wife, Helen D. Brown, to the Washington Building & Loan Association, and holds the same as security for the sum of $5,000, evidenced by two notes of the said C. M. Brown, one in the sum of $3,000, with interest from 23 June, 1922, and the other in the sum of $2,000, bearing interest at six per cent, from 12 July, 1922; said mortgage having been duly assigned to the plaintiff as security for said indebtedness and the said mortgage is a lien upon the property described in the same subject only to the deed of trust to Stephen C. Bragaw, trustee."

The defendants, Bank of Washington, Savings & Trust Co., and W. Gray Willis, are interveners. The Bank of Washington says that it "is now the owner and holder of the notes secured by deed in trust" to Stephen C. Bragaw, and all the interveners, in substance, allege and aver "that the true facts in connection with the mortgage or paper-writing recorded in Book 227, page 538, are that on or about 24 June, 1919, C. M. Brown and wife, Helen D. Brown, borrowed from the Washington Building & Loan Association a sum of money not exceeding $12,500, being the indebtedness recited in the said paper-writing, recorded in Book 227, page 538; that the said paper-writing or mortgage was not filed for record until 27 January, 1921; that on or about 13 December, 1921, the defendants, C. M. Brown and wife,

Helen Brown, executed a mortgage to the Washington Building & Loan Association on that lot, tract or parcel of land situate on the south side of Main Street in the city of Washington, and being bounded on the east by F. C. Kugler and wife, and on the west by B. L. Susman, which mortgage or deed of trust secured the sum of $12,500, and which is of record in the office of the register of deeds of Beaufort County in Book 233, page 268; that the said mortgage was filed for record on 20 December, 1921; that the said mortgage or deed of trust was by agreement between the said Washington Building & Loan Association and the said C. M. Brown and wife, Helen D. Brown, executed by the said Brown and received by the said Washington Building & Loan Association in satisfaction and payment of the indebtedness due by the said Brown and wife to the Building & Loan Association and secured by the paper-writing recorded in Book 227, page 538, and that upon the execution and delivery and recordation of the said mortgage from Brown and wife to the Washington Building & Loan Association, dated 13 December, 1921 and recorded on 20 December, 1921, in Book 233, page 268, the said Washington Building & Loan Association paid, marked paid and discharged or satisfied and discharged, the note and mortgage given by the said Brown and wife to the Washington Building & Loan Association on or about 24 June, 1919, and recorded in Book 227, page 538; and that by agreement between the parties thereto the indebtedness secured by the said mortgage or paper-writing was fully paid and discharged by the execution of the mortgage and note, dated on or about 13 December, 1921; that, as it is advised, believe and so alleges, after said mortgage and note from Brown and wife to the Building & Loan Association, dated 24 June, 1919, had been marked paid and canceled by the said Building & Loan Association, and after the rendition and docketing of the judgment hereinafter referred to, or some of them, the said C. M. Brown delivered to the said N. E. Saleeby the canceled and paid note and mortgage given by the said Brown and wife to Washington Building & Loan Association on or about 24 June, 1919."

The Bank of Washington also sets up ownership to numerous judgments assigned to it against C. M. Brown, duly docketed in the office of the clerk of the Superior Court of Beaufort County.

Savings & Trust Co. sets up ownership to a judgment against C. M. Brown duly docketed, etc.

W. Gray Willis sets up ownership to a judgment against C. M. Brown, duly docketed, etc.

Stephen C. Bragaw, trustee, sold the property under the trust deed and it brought $27,000 and all the money has been distributed according

to priorities of liens except $6,200 to be held by him until the final determination of this action and another smaller sum for the determination of another action.

The interveners pray that the funds from the sale of the property in the hands of Stephen C. Bragaw, trustee, be declared prior liens to any claim or lien of the plaintiff, N. E. Saleeby.

The plaintiff, in answer to the Bank of Washington, intervener, says: "That at the time, the said mortgagors, after substituting said other mortgage intended to reserve the lien of the original mortgage and to keep same alive. That this plaintiff is a native of Assyria and was unable, at the time he became the owner of the mortgage referred to in the complaint, to read and write the English language. That for several years prior to 20 December, 1921, this plaintiff and the said C. M. Brown had been friends, and this plaintiff had had and reposed great confidence in the said C. M. Brown. That at the time of exchanging said mortgages the said C. M. Brown requested this plaintiff to make him a loan thereon of $5,000, and stated to this plaintiff that the said mortgage was a valid and subsisting lien; that the same was not in anyway discharged upon the records of Beaufort County or elsewhere, and that the same constituted a first and paramount lien upon the property therein described, and plaintiff, believing and relying upon said statements of said C. M. Brown, and being well acquainted with the property therein described, loaned the said C. M. Brown the sum of $5,000 in cash, and the said C. M. Brown transferred in writing the said mortgage to the plaintiff as security for said debt. That at the time of said transaction the said C. M. Brown was the owner in fee simple of the property described in the said mortgage and none of the judgments held by the Bank of Washington, referred to in their interplea, had been rendered and the indebtedness thereby represented had not been incurred by the said C. M. Brown."

In the trial of the cause, the following was in evidence:

C. M. Brown, on cross-examination, said: "The mortgage was given by me on 24 June, 1919, and I borrowed from the Building & Loan Association at that time $12,500. Subsequently to that time the Building & Loan Association stated to me that they wanted another and first mortgage to secure their indebtedness and in response to their demand, Mrs. Brown and I executed another mortgage dated 13 December, 1921, for $12,500, recorded in Book 233, page 268, and when the mortgage of 13 December, 1921, had been given and recorded, Mr. Webb returned to me the mortgage of 24 June, 1919. Mr. Webb is secretary of the Building & Loan Association. I know his handwriting. He wrote on the mortgage of 24 June, 1919, paid and satisfied.

Washington Building & Loan Association, John D. Webb, secretary, 21 December, 1921, and delivered the mortgage to me. I was vice-president of the Building & Loan Association. The mortgage of 24 June, 1919, is on business property, and the mortgage of 13 December, 1921, is on my home, a different tract of land. Not all of the indebtedness to the Building & Loan Association has been paid."

COPY OF COVER SHEET

C. M. Brown and wife
to
Washington B. & L. Assn.
Mortgage.

"Filed for registration at 2 o'clock p. m. 27 January, 1921, and registered in the office of the Register of Deeds of Beaufort County in Book 227, page 538.
$2.00 G. RUMLEY, *Register of Deeds.*

W. L. VAUGHAN, *Attorney at Law,*
Washington, N. C.

Paid and satisfied,
WASHINGTON BUILDING AND LOAN ASSN.
John D. Webb, *Secretary.*

22 December, 1921.

Placed and transferred to N. E. Saleeby, as security for loan of $3,000 and $2,000, for which he holds my note of this date.
23 December, 1921."

"C. M. BROWN,
Box 166, Washington, N. C.

I have placed with N. E. Saleeby, as collateral to secure loan, mtg. executed to Washington B. & L. Association, which is duly recorded in Book 227, page 538, in the register's office of Beaufort County.

He is to hold same to secure payment of certain notes, one for $3,000, one for $2,000, one for $216.00.

The Washington B. & L. Association has been duly satisfied as to this mortgage, and the note executed *to them* in connection with same has been canceled and destroyed.

1 Aug., 1922. C. M. BROWN."

SALEEBY *v.* BROWN.

N. E. Saleeby made the following loans to C. M. Brown—checks drawn on the Bank of Washington:

December 24, 1921	$1,000
December 24, 1921	2,000
January 10, 1922	1,000
January 10, 1922	1,000

On 12 July, 1922, Brown gave Saleeby a note at four months, for $2,000, and on 23 June, 1922, a note at three months for $3,000.

The issue submitted and answer thereto was as follows:

"Was the mortgage from Brown and wife to the Washington Building & Loan Association and the debt secured by it paid at the time of the transfer by Brown to the plaintiff Saleeby? Answer: Yes."

The charge of the court below was as follows:

"This is an action brought by N. E. Saleeby against C. M. Brown and others, to recover the sum of $5,000, which the plaintiff Saleeby alleges is due him by Brown, and secured by a certain mortgage which has been introduced. You, gentlemen of the jury, have heard the evidence in the case, and of which you are the sole judges. You have heard the evidence for the plaintiff, and you have heard the evidence for the defendant in the case, and also you have heard the evidence for the interpleaders. The defendant, Brown, offers no testimony and files no answer or other pleading. And so, I instruct you, gentlemen of the jury, if you find the facts as claimed to be by the plaintiff, to answer the first issue 'Yes.' Following is the issue, 'Was the mortgage from Brown and wife to the Washington Building & Loan Association and the debt secured by it paid at the time of the transfer by Brown to the plaintiff, Saleeby?' And so, if you find by the greater weight of the evidence the facts as claimed to be by the witnesses for the plaintiff, I instruct you to answer the issue 'Yes.'"

The court below rendered judgment against C. M. Brown defendant, for the debt of $5,000 due plaintiff, and the mortgage made by C. M. Brown and wife to Washington Building & Loan Association, 22 June, 1919 "was fully satisfied and discharged, and that the plaintiff, Saleeby, has no right or interest in the surplus derived from the sale," etc., and the surplus distributed in accordance with priority of judgments, etc.

Numerous exceptions and assignments of error were made to the exclusion by the court below of evidence tending to contradict and vary what was written on the Building & Loan mortgage and to show an understanding and intention different from what was written on the mortgage; to refusal of certain prayers for instructions. Also that

the Bank of Washington was estopped to claim the judgments assigned to them as against plaintiff.

In the progress of the trial the plaintiff moved the court for leave to amend the complaint, if such amendment was required, to allege that the writing on the back of said paper by the secretary of the said Building & Loan Association was an error or mistake, etc. The court declined to grant this motion to amend.

The plaintiff duly assigned error and appealed to the Supreme Court.

W. C. Rodman and Harry McMullan for plaintiff.

L. C. Warren, Ward & Grimes, Stewart & Bryan and Small, MacLean & Rodman for defendants.

CLARKSON, J. From the entire record it is shown that the defendant, C. M. Brown and wife, Helen D. Brown, made and executed on or about 24 June, 1919, to secure a note of $12,500, a mortgage on certain business property to the Washington Building & Loan Association. This mortgage was not recorded until 27 January, 1921. That to satisfy the Building & Loan (a subsequent mortgage made by Brown and wife to Bragaw, trustee, having been recorded prior to the Building & Loan mortgage on the same property) Brown and wife were requested to give a first mortgage to secure the indebtedness on another piece of property. This was done and the $12,500 note and mortgage first made to the Building & Loan Association were turned over to C. M. Brown, who was vice-president of the Building & Loan Association, and on 22 December, 1921, John D. Webb, secretary of the Washington Building & Loan Association, wrote on the mortgage "paid and satisfied." This mortgage was satisfied by a new mortgage on other property, his home, made by Brown and wife. The consideration or payment of the first note and mortgage being the property of Brown and wife. On the next day, 23 December, 1921, C. M. Brown wrote on the mortgage that had been turned over to him marked "paid and satisfied" by the Building & Loan secretary, the following: "Placed and transferred to N. E. Saleeby, as security for loan of $3,000 and $2,000, for which he holds my note of this date."

It was in evidence that the $5,000 was loaned by plaintiff giving four checks totalling $5,000 to defendant Brown, on the Bank of Washington, which were duly paid. These checks were given after the transfer by Brown to Saleeby of the mortgage which had been marked "paid and satisfied," the first check of $1,000, being dated 24 December, 1921. It was in evidence that in June and July, 1922, two notes were given Saleeby by Brown totalling $5,000. It appears in evidence that on 1 August, 1922, C. M. Brown signed the statement set out in facts

of this case, which closes as follows: "The Washington Building & Loan Association has been duly satisfied as to this mortgage, and the note executed *to them* in connection with same has been canceled and destroyed."

On this admitted evidence, we think the charge of the court below correct. Brown paid the mortgage with his own property. The mortgage was by the Building & Loan Association secretary marked "paid and satisfied," and Brown himself signed the paper-writing in which he says that the Building & Loan Association has been satisfied as to the mortgage and the note "has been canceled and destroyed." *Walker v. Mebane,* 90 N. C., 259; *Smith v. Bynum,* 92 N. C., 108; *Blake v. Broughton,* 107 N. C., 220; *Hussey v. Hill,* 120 N. C., 312.

It was said in *Stevens v. Turlington,* 186 N. C., p. 194: "And, finally, when the debt is paid, the title of the mortgagee is thereby extinguished, and all his interests in the land revert immediately to the mortgagor by operation of law. *Porter v. Miller,* 9 Mass., 101."

To discharge the debt and mortgage to secure same, there is a vast difference as to who furnishes the money or property. If it is the mortgagor and the note and mortgage is surrendered and the mortgage marked "paid and satisfied" as in the present case the debt is paid and the lien extinguished. If a third person advances the money or property, a different principle applies. The authorities, if carefully analyzed, will bear out this distinction.

In *Bank v. Bank,* 158 N. C., p. 244, it is said: "The authorities are entirely agreed, though, that where a person advances money to pay off a mortgage debt under an agreement with the owner of the equity of redemption or his representative that he shall hold the mortgage as security for his advance, but the mortgage, instead of being assigned to him, is discharged in whole or in part, he is yet entitled as against subsequent parties in interest to be subrogated to the rights of the mortgagee and to enforce the mortgage." *Davidson v. Gregory,* 132 N. C., 389; *Grantham v. Nunn,* 187 N. C., 394.

In 19 R. C. L., part sec. 229 (p. 445), the following is laid down: "There is no principle which permits a mortgagor who has paid his mortgage and taken a satisfaction, there being at the time no equitable reason for keeping it afoot, subsequently to resusitate and reissue it as security for a new loan or transaction, especially where the rights of third parties are in question, and it would make no difference whether the reissue of the mortgage was before or after the new rights and interests had intervened. It is possible that the circumstances of the reissue may be such as to furnish ground for a court of equity to intervene and compel the execution of a new mortgage, to accomplish the real purpose of the parties, and notice of such circumstances to the

subsequent grantee or mortgagee might, perhaps, under special conditions, subject his right to the prior equity. But the contention that a person having at the time notice that a mortgage had been paid by the mortgagor in usual course, can, by a verbal arrangement between himself and the mortgagor, give the extinct mortgage vitality again as security for a new loan, so as to give it priority over a subsequent conveyance or mortgage is not justified by the authorities." *Bogert v. Striker et al.*, 42 N. E. Rep. (N. Y.), 582; *Flye v. Berry*, 63 N. E. Rep. (Mass.), 1071; *Hibernia Nat. Bank v. Succession of Gragard*, 33 So. Rep. (La.), 728; *Porter v. Title Guaranty, etc. Co.*, 17 Idaho, 364.

It is said in *Wilkes v. Miller*, 156 N. C., p. 431: "The substitution of one note and mortgage for another will not discharge the lien of the original note and mortgage unless the latter is surrendered to the mortgagor, or canceled of record. It is only a renewal or acknowledgment of the same debt. *Collins v. Davis*, 132 N. C., 106; *Hyman v. Devereux*, 63 N. C., 626."

In the present case, the mortgage was not canceled of record, but it was surrendered to the mortgagor and marked "paid and satisfied." and the note also surrendered to mortgagor and "canceled and destroyed."

In *Collins v. Davis, supra*, cited by the plaintiff, *Justice H. G. Connor*, writing the opinion in that case, carefully says: "We have not overlooked the case of *Smith v. Bynum*, 92 N. C., 108. *There, the note and mortgage were surrendered to the mortgagor.*" (Italics ours.)

It is well-settled doctrine that neither in law nor equity can a note and mortgage paid by the mortgagor and the mortgage marked "paid and satisfied" and both note and mortgage delivered to the mortgagor, be resusitated and revivified.

To protect plaintiff, a new note or notes secured by mortgage should have been made. The note turned over to the mortgagor and the mortgage marked "paid and satisfied" and surrendered to the mortgagor, so far as law and equity are concerned, were as dead as an Egyptian mummy.

The case of *Furniture Co. v. Potter*, 188 N. C., 145 has no application. That case discusses the doctrine of merger.

From a careful reading of the record and briefs and hearing the argument of counsel, we think that the court below made no error. The exceptions and assignments of error by the plaintiff cannot be sustained. It was in the discretion of the court below to grant or refuse an amendment to the complaint. From the facts and circumstances, we do not think the principle of estoppel applies as to the Bank of Washington.

Upon the entire record, we can find

No error.

L. S. GORDON v. ERSKIN EHRINGHAUS ET AL.

(Filed 23 September, 1925.)

Wills—Residuary Clause—Lands—Specific Devises.

After making disposition by will of certain of the property by item six, the testator provides "whatever may remain of my estate both real and personal" to be divided and distributed, with particular direction as to named devisees, with further direction that if the devisees or any of them should caveat the will, they should receive ten dollars each: *Held*, under the presumption against intestacy and construing the will to effectuate the testator's intent, a tract of land not specifically mentioned in the will came within the meaning of the residuary clause and not excluded because a lot of land had been described therein, as particularly subject to its provisions.

APPEAL by several of the respondents from *Devin, J.*, from PASQUOTANK.

Petition for a redistribution of a portion of the funds derived from a sale of certain lands belonging to D. B. Bradford at the time of his death, and which, it is alleged, passed to the devisees mentioned in the residuary clause of his will.

From an order declaring and adjudging the interests of the respective parties in the funds derived from a sale of the lands had for partition, as passing under the testator's will, some of the respondents appeal.

McMullan & LeRoy for appellants.
Ehringhaus & Hall for appellees.

STACY, C. J. This is a companion case to *Whitehurst v. Gotwalt*, 189 N. C., 577, heard at the last term, and in which we had occasion to consider the validity and meaning of a forfeiture clause or clause against contest, with limitation over, contained in the will of D. B. Bradford. There the litigants were divided into three classes, and such division is applicable here: (1) "Caveators," or those whose interests in the lands had been forfeited, under the terms of the will, because of their effort to caveat same in the absence of any probable cause therefor; (2) "Neutrals," or those who took their original interests under the will, unaffected by the caveat proceedings; and (3) "Propounders," or those who stood firmly by testator's will, and whose devises were increased by an equal division among them (per stirpes) of the forfeited interests of the caveators.

The testator foresaw a possible contest over his will, and he undertook to provide against it. But should his efforts in this respect prove abortive, as they did, it was his purpose to require the beneficiaries named thereunder to elect as to what attitude they would take in

regard to such a contest. Following this election or choice, the testator then declared in substance: "He that is for me, let him be for me still; he that is against me, let him be against me still; and he that is neutral, let him be neutral still."

In deference to the decision rendered in *Whitehurst v. Gotwalt, supra,* it is conceded by counsel in the present proceeding, that if the property here in question, passed under the terms of the Bradford will to the "legatees or beneficiaries" mentioned in item six thereof, the judgment should be affirmed; otherwise, it should be reversed. And, in the latter event, it is stipulated that the funds arising from a sale of the property shall be adjudged to belong to the heirs at law of the testator, as undevised property. The appeal, therefore, presents for decision the single question as to whether the lands described in the petition passed under the following item in the will of D. B. Bradford:

"Sixth: After the above bequests have been provided for and paid then whatsoever may remain of my estate, both *real and personal* I direct and will, shall be divided and distributed in the following manner to the parties herein named.

"To my dear wife, Minerva I. Bradford, I give (certain stocks and bonds, specifically enumerating them; all moneys in bank, and a business lot in Elizabeth City, describing same; none of which is here in controversy). I also give to her the one-third interest in whatever I may own, at the time of my death in the lot, situated in Elizabeth City, N. C., and bounded on the north by Main Street, on the east by Poindexter Street, on the south by Fearing Street, and on the west by McMorine Street; then I give to my nephew, John B. Fearing, two-ninths (2-9) interest in the above described lot; and to the heirs of my nephew, Woodson B. Fearing, deceased, viz.: D. B. Fearing, Keith Fearing, and Woodson Fearing, one-ninth (1-9) interest in said lot above to be equally divided between them; to my nephew, John B. Griggs, and my niece, Mary Whitehurst, I give two-ninths (2-9) to be equally divided between them; and to the heirs of my first wife's (Matilda G. Bradford) brothers, Erskin Ehringhaus, Blucher Ehringhaus, deceased, John C. Ehringhaus, deceased, and her brother, William F. Ehringhaus, and the heirs of her sister, Christena Culpepper, deceased, I do give one-ninth (1-9) part interest in the said described lot, to be equally divided between them. Should any of the nephews or nieces of my first wife die without lawful issue, begotten of their body, the part or share intended for them shall revert to those of them then living at the time of my death.

"I do hereby and herein instruct and demand of my executrix that if any attempt is made on the part of any of the beneficiaries herein named to defeat, nullify or contest in law or otherwise, the disposition or divi-

sion of my property as herein made by me, that those so endeavoring to defeat, nullify or contest my wishes as herein expressed, *shall not be entitled to the part I have intended for them,* and shall only receive the sum of ten dollars ($10.00) each, and that part or portion of my estate herein set apart for them, shall revert to the other legatees or beneficiaries as may stand firmly by my wishes as herein expressed and defend the distribution and disposal herein made by me of my property."

The lands in question are not specifically mentioned in testator's will; and it is the position of the appellants that they cannot be held to have passed under item six, because the general description of "whatsoever may remain of my estate, both real and personal," is followed by a particular description which, appellants say, shows an intention on the part of the testator to exclude all other property not specifically mentioned therein. The following authorities are cited by appellants as supporting, in tendency at least, their view of the law: *Kidder v. Bailey,* 187 N. C., 505; *Johnston v. Case,* 131 N. C., 494; *Peebles v. Graham,* 128 N. C., 218; *Midgett v. Twiford,* 120 N. C., 4; *Cox v. McGowan,* 116 N. C., 131; *Alexander v. Alexander,* 41 N. C., 229; *Reddick v. Leggat,* 7 N. C., 539.

The appellees, on the other hand, take the position that the testator intended to divide all the rest and residue of his property (except as otherwise exclusively given to his widow) among the beneficiaries named in item six of his will, in the same manner and proportions as the last lot of land is devised therein. We are not now concerned with the proportionality of the shares of the respective parties, nor with the quere as to whether the character of the property, real or personal, would make any difference. These matters have been eliminated by consent of counsel. The only question for decision is whether the lands, described in the petition, passed under item six of the will. The whole case pivots on the answer to be made to this question. The words used are plenary, and we are of opinion that they must be held to include all of the residue of testator's property, both real and personal. "It is generally conceded that, in the construction of a will, the cardinal purpose is to ascertain and give effect to the intention of the testator—not the intention that may have existed in his mind, if at variance with the obvious meaning of the words used, but that which is expressed by the language he has employed. The question is not what the testator intended to express, but what he actually expressed in his will, when all its provisions are considered and construed in their entirety." *Adams, J.,* in *McIver v. McKinney,* 184 N. C., p. 396.

The record is silent as to whether the lands in question were acquired by the testator before or after the making of his will; but this, we

apprehend, can make no difference, as the will is to be construed as having been executed immediately prior to testator's death, unless a contrary intention appear therefrom. C. S., 4165; *Brown v. Hamilton,* 135 N. C., 10.

When a person, who is capable of doing so, undertakes to make a will, the law presumes that he did not intend to die intestate as to any part of his property. *Allen v. Cameron,* 181 N. C., 120; *Austin v. Austin,* 160 N. C., 367; *Powell v. Woodcock,* 149 N. C., 235; *Blue v. Ritter,* 118 N. C., 580; *Reeves v. Reeves,* 16 N. C., 386. And in addition to this presumption against partial intestacy, we think the language used, in item six of the will before us, is sufficient to cover all of testator's property. *Foy v. Foy,* 188 N. C., 518. "The presumption is that every one who makes a will intends to dispose of his whole estate, and one purpose of a general residuary clause is to dispose of such things as may have been forgotten or overlooked, or may be unknown." *Pearson, J.,* in *Ireland v. Foust,* 56 N. C., 498.

For a helpful discussion of the subject, containing many arguments in support of the conclusion here reached, see opinion of *Mr. Justice Strong* in *Given v. Hilton,* 95 U. S., 591, 24 L. Ed., 458, and opinion of *Gray, J.,* in *Miner's Case,* 146 N. Y., 121.

In dealing with the residuary clause of a will which is ambiguous, it is required, by the general rule of construction, that a liberal, rather than a restricted, interpretation be placed upon its terms; for a partial intestacy may thereby be prevented, which, it is reasonable to suppose, the testator did not contemplate. *Lamb v. Lamb,* 131 N. Y., 227. And in performing the office of construction, the Court may reject, supply or transpose words and phrases in order to ascertain the correct meaning and to prevent the real intention of the testator from being rendered abortive by his inapt use of language. *Carroll v. Mfg. Co.,* 180 N. C., 366; *Taylor v. Johnson,* 63 N. C., 381.

While conceding that the above rule of construction makes for the appellees' position on the instant record, appellants, who would take under the canons of descent, in case of intestacy, invoke the equally well established rule of construction that heirs should not be disinherited, except by express devise or necessary implication. *Whitfield v. Garris,* 134 N. C., 24; *Dunn v. Hines,* 164 N. C., 113. There can be no doubt as to the establishment and soundness of this latter rule against disinheritance; and our present interpretation in no way infringes upon it, for the testator, in the will before us, has expressly devised his property to others. "There is a cardinal rule, also, that the heir should not be disinherited except by express devise or by one arising from necessary implication, by which the property is given to another,

though the right of the testator to omit the heir from his will is not to be denied or curtailed." Underhill on Wills, sec. 466; *Kidder v. Bailey, supra.*

It is pointed out in appellees' brief that testator undoubtedly thought he was disposing of his entire estate, because it is provided in the forfeiture clause that, in case of a contest, the caveators "shall not be entitled to the part I have intended for them, and they shall only receive the sum of ten dollars ($10.00) each." The limitation of such interests to only $10.00 each would seem to be inconsistent with any idea of partial intestacy, as appellants would thereby share in a portion of testator's estate, being, as they are, in the class of heirs.

It follows from what is said above that the record is free from error. The cases, cited and relied upon by appellants, are not in conflict with our present position.

Affirmed.

S. J. BARTHOLOMEW & COMPANY v. S. L. PARRISH.

(Filed 23 September, 1925.)

Appeal and Error—Record—Judgment—Facts Found—Case on Appeal—Inconsistent Statements.

The judgment setting forth the facts in a case on appeal to the Supreme Court is a part of the record, and controls when the statement in "the case on appeal" is in material conflict.

APPEAL by defendant from *Sinclair, J.,* at March Term, 1925, of NASH.

Motion of defendant to set aside judgment, rendered in this cause at the October Term, 1924, on the ground that said judgment was taken through surprise or excusable neglect. C. S., 600. Motion denied, and defendant appeals.

Cooley & Bone and E. B. Grantham for plaintiff.

W. H. Yarborough, D. W. Perry and Ben. T. Holden for defendant.

STACY, C. J. The judge found the facts and embodied them in the judgment. On the findings made, supported, as they are, by competent evidence, the motion was properly overruled. *Smith v. Holmes,* 148 N. C., 210; *Marsh v. Griffin,* 123 N. C., 660. But in the statement of case on appeal the following appears:

"At the conclusion of the reading of the affidavits the court stated that, while it seemed a great hardship upon the defendant, it would hold as a matter of law upon the defendant's own showing and taking

the contents of the affidavits in consideration, that he was not entitled to have the judgment set aside, and for that reason the motion was denied. To this ruling of the court the defendant excepted."

This statement, which forms the basis of defendant's appeal, is slightly at variance with the facts found and incorporated in the judgment. Under these circumstances, where the record proper differs from the statement of case on appeal, it is the uniform holding of the Court that the former must govern. *S. v. Wheeler,* 185 N. C., 670; *Moore v. Moore, ibid.*, 332. The judgment is a part of the record proper (*Thornton v. Brady,* 100 N. C., 38), while the statement of case on appeal is not. *S. v. Matthews,* 142 N. C., 621.

Therefore, disregarding that part of the statement of case on appeal, which apparently is inconsistent with the facts recited in the judgment, we find no error. There was no motion to reform the judgment so that it might conform to the facts set out in the statement of case on appeal.

During the same term of court, at which the judgment was rendered, a motion was made to set it aside, on the ground that it was contrary to the weight of the evidence. This was overruled. Appellee takes the position that the reasons now urged for a vacation of the judgment (surprise and excusable neglect) should have been presented at the time of the first motion and that movant is guilty of laches in failing to do so. It is not necessary to give a definite ruling on this point, but where relief from a judgment is sought by a party "upon such terms as may be just" (C. S., 600), it would seem that a proper regard for the rights of both parties would call for reasonably prompt action on the part of the movant after notice of the judgment.

The judgment must be upheld on the facts found by the trial court.

Affirmed.

LOUVENIA PHILLIPS v. R. L. RAY ET AL.

(Filed 23 September, 1925.)

Appeal and Error—Objections and Exceptions—Irregular Judgments—Motions.

A judgment in appellant's favor taxing the costs of action at variance with the decision of the Supreme Court rendered on appeal, signed upon appellant's motion in the Superior Court, C. S., 659, after examination had been afforded to the appellee's attorney, is not irregular, and when not thus taken through mistake, inadvertence, surprise or excusable neglect, the procedure is by exception and appeal, and not by motion in the cause at a subsequent term of the trial court.

PHILLIPS *v.* RAY.

APPEAL by defendants from *Bond, J.*, at February Term, 1925, of JOHNSTON.

At April Term, 1922, judgment was rendered that plaintiff in this action recover of defendants the sum of $1,500, with interest from 3 November, 1919. It was further adjudged that plaintiff pay the costs. From this judgment, defendants appealed to the Supreme Court. The appeal was heard at Fall Term, 1922, of the Supreme Court, and the judgment was affirmed. No opinion was filed, 184 N. C., 796. It was ordered that defendants pay the costs incurred by the appeal in the Supreme Court.

At December Term, 1922, of the Superior Court of Johnston County, plaintiff moved for judgment upon the certificate that the judgment appealed from had been affirmed by the Supreme Court, C. S., 659. The judgment prepared by attorney for plaintiff, after same had been shown to attorney for defendants, was signed by the judge presiding. In this judgment, it was adjudged that defendants pay the costs, contrary to the provisions of the judgment which had been affirmed, on defendants' appeal, by the Supreme Court. This judgment was signed without the knowledge of defendants, and although shown to their attorney before same was tendered to the judge, was not consented to by him.

As soon as defendants discovered that judgment had been signed upon certificate of Supreme Court, contrary to the provisions of the judgment affirmed by said court, upon appeal, and within one year from its rendition, defendants moved in this action that said judgment be corrected. Upon the hearing of this motion, the court being of the opinion that defendants' remedy was by an appeal from the judgment to the Supreme Court, and not by motion in the original cause, denied the same. From judgment denying their motion, defendants appealed.

Ed S. Abell for plaintiff.
R. L. Ray for defendants.

PER CURIAM. It was error for the Superior Court of Johnston County, at December Term, 1922, to render judgment, upon the certificate from the Supreme Court, contrary to the provisions of the judgment rendered at April Term, 1922, and affirmed upon appeal to the Supreme Court, with respect to the costs. Said judgment was erroneous; it could not be corrected, at a subsequent term of the said court. It could have been corrected only by appeal to the Supreme Court. The judgment is not irregular; nor is it contended or found that it was taken against defendants through their mistake, inadvertence, surprise or excusable neglect. Defendants complain that the judgment is erroneous and ask

that same be corrected. It was not, therefore, reviewable at a subsequent term of the Superior Court; *Dockery v. Fairbanks,* 172 N. C., 529. "A judgment of the Superior Court rendered in term by the judge can be reviewed for error only upon appeal to the Supreme Court upon exceptions duly noted," *Duffer v. Brunson,* 188 N. C., 789; *Livestock Co. v. Atkinson,* 189 N. C., 250; *Caldwell v. Caldwell,* 189 N. C., 805.

There is no error and the judgment is

Affirmed.

S. E. FINCH ET AL. v. COMMISSIONERS OF NASH COUNTY ET AL.

(Filed 23 September, 1925.)

Appeal and Error—Docketing—Extension of Time—Agreement of Counsel—Approval of Judge—Statutes.

In order for the appellant to have his appeal determined by the Supreme Court as a matter of right, it is imperative that he docket it in the Court under the rule as it applies to his district, and no consent of the parties as to extended time to be given, in making up and settling the case, etc., and no approval thereof of the trial judge under the provisions of C. S., 643 can have additional force when by reason thereof the appeal has been docketed later than the time required by the rule.

MOTION for *certiorari* to have case brought up from NASH Superior Court and heard on appeal.

J. W. Bailey and O. B. Moss for plaintiffs, movants.

STACY, C. J. It appears from an inspection of the record now before the Court, that the plaintiffs instituted this action on 1 July, 1925, to enjoin the Board of Education of Nash County from consolidating certain school districts, and further to restrain the board of commissioners of said county from levying taxes in the proposed consolidated territory or districts. There was a preliminary restraining order issued in the cause, returnable before Judge M. V. Barnhill at Rocky Mount on 10 July, 1925. Upon the hearing before Judge Barnhill the temporary restraining order was dissolved and the action dismissed, it appearing that injunctive relief was the primary and only remedy sought by plaintiffs. To this judgment, the plaintiffs excepted and gave notice of appeal to the Supreme Court. By consent, plaintiffs were allowed sixty days within which to prepare and serve statement of case on appeal, and the defendants were allowed thirty days thereafter to file exceptions or counter statement of case. This application for *certiorari* was made on 1 September, 1925, for the reason that "the

case on appeal has not been served or made up; and therefore the record is not in condition for hearing at this term of the Supreme Court."

Under our settled rules of procedure, an appeal from a judgment rendered prior to the commencement of a term of the Supreme Court must be brought to the next succeeding term; and, to provide for a hearing in regular order, it is required that the same shall be docketed here seven days (14 after 1 January, 1926) before entering upon the call of the docket of the district to which it belongs, with the proviso that appeals in civil cases from the First, Second, Third and Fourth Districts, tried between the first day of January and the first Monday in February, or between the first day of August and the fourth Monday in August, are not required to be docketed at the immediately succeeding term of this Court, though if docketed in time for hearing at said first term, the appeal will stand regularly for argument. Rule 5, Vol. 185, page 788, as amended, Vol. 189, page 843. In numerous decisions of the Court dealing directly with the subject, it has been held that these rules governing appeals are mandatory and not directory. *Walker v. Scott,* 102 N. C., 490. The only modification sanctioned by the decisions is that where, from lack of sufficient time or other cogent reason, the case is not ready for hearing, it is permissible for the appellant, within the time prescribed, to docket the record proper and move for *certiorari,* which motion may be allowed by the Court, in its discretion, on sufficient showing made, but such writ is not one to which the moving party is entitled as a matter of right. *S. v. Farmer,* 188 N. C., 243. *S. v. Johnson,* 183 N. C., 730.

It is urged on behalf of movants that the writ should issue in the instant case, because the trial judge, under authority of C. S., 643, as amended by chap. 97, Public Laws 1921, approved the agreement of counsel that the time for serving statement of case on appeal and exceptions thereto, or counter statement of case, should be extended, and that the time so extended has not yet expired. True, the discretionary power to enlarge the time for preparing and serving statement of case on appeal and exceptions thereto, or counter statement of case, is lodged in the trial court by virtue of the statute above mentioned (*S. v. Humphrey,* 186 N. C., 533); but this gives him no more authority to abrogate the rules of the Supreme Court than litigants or counsel would have to impinge upon them by consent or agreement. *Cooper v. Comrs.,* 184 N. C., 615.

In *S. v. Butner,* 185 N. C., 731, it was said: "It is out of the power of the judge or solicitor to dispense with the rule of this Court requiring such docketing at the time prescribed by the rules of this Court. While the Legislature can extend the time for settling a case on appeal, it cannot impinge upon the rules of this Court, *Herndon v. Ins.*

Co., 111 N. C., 384, specifying the time in which an appeal must be docketed, unless the Court shall see fit to grant a *certiorari*, which is a matter within its discretion."

Again, in *S. v. Dalton*, 185 N. C., 606, it was said: "The decisions of this Court have been uniform that on failure to docket the appeal in the time prescribed, it will be docketed and dismissed, unless a motion is made for *certiorari* at the next succeeding term and sufficient cause shown for the failure." See, also, *Byrd v. Southerland*, 186 N. C., 385; *Rose v. Rocky Mount*, 184 N. C., 609; *Mimms v. R. R.*, 183 N. C., 436, where the whole matter is discussed at considerable length, with full citation of authorities.

The order of the judge, in so far as it is relied upon as authority for disregarding the rule requiring the appeal to be brought to the next succeeding term of the Supreme Court, can have no greater weight than an agreement between counsel or litigants to this effect. Speaking to the force of such an agreement in *S. v. Farmer, supra, Hoke, C. J.*, said: "It is insisted that by agreement between counsel for appellant and the solicitor, the time for preparing the case on appeal was extended beyond the opening of the fall session of this Court, and that as a matter of fact the solicitor of the district is still engaged in preparing the counter-case for the State on defendant's appeal. But such a position cannot for a moment be allowed. These rules, prepared pursuant to the powers vested in this Court by the Constitution, and designed to promote the expeditious and orderly hearing of causes on appeal, are in no wise subject to the agreement of counsel. As held in *Rose v. Rocky Mount, supra*, neither parties litigant nor their attorneys have authority by agreement among themselves to disregard them."

Recurring to the facts, appearing on the record, we are of opinion that no sufficient cause has been shown for appellants' failure to prosecute the appeal and to have the same here at the next succeeding term of the Court as required by the rules. As already stated, the action is to enjoin the defendant, board of education, from consolidating certain school districts, and to restrain the county board of commissioners from levying taxes to carry on the schools in said consolidated districts. The matter was heard before Judge Barnhill, 10 July, 1925, on the pleadings, affidavits and oral testimony of one witness. The judge found the facts and embodied them in his judgment. The record is not large. The case is one in which the public has an interest. The only reason assigned for appellants' failure to have the appeal ready for hearing at the present term of Court is that, by consent of the parties, approved by the judge, the time for settling the case was extended. The showing thus made is not sufficient to warrant the issuance of a *certiorari*.

Motion denied.

CAROLINA DISCOUNT CORPORATION v. LANDIS MOTOR COMPANY.

(Filed 30 September, 1925.)

1. Statutes—Interpretation—Captions—Title.

The caption or title of a statute cannot by interpretation have the effect of extending the clear and unambiguous meaning thereof as expressed in the body of the act.

2. Automobiles—Statutes—Interpretation—Transfer of Title—Mortgages.

Chapter 236, Public Laws of 1923, requiring a certificate of the transfer of title to an automobile to be issued to purchaser by the Secretary of State (now Commissioner of Revenue), making its violation a misdemeanor, is a penal statute and strictly construed, *in pari materia* with our registration laws, C. S., 3311, 3312, relating to the registration of mortgages, and it does not repeal the latter statutes so as not to require the registration of title retaining contract to secure the balance due on the purchase price of an automobile, as against subsequent purchaser for value, and no notice however formal is sufficient to supply that of registration required by the statute.

3. Same—Courts.

Where the vendor of an automobile has sold the same without complying with our statute requiring a certificate of the transfer of title, *semble* the court may direct him to deliver this certificate to the vendee so that he may comply with the statute and obtain a new certificate.

APPEAL by plaintiff from VANCE Superior Court. *Devin, J.*

Action by plaintiff to recover a Ford automobile from defendant. Upon agreed facts judgment was rendered for defendant. Affirmed.

The facts agreed are as follows:

"Plaintiff sues to recover of defendant a Ford coupé. It was sold 20 December, 1924, by Louisburg Motor Co. to J. B. Champion, of Franklin County, seller taking a title retained note that was never registered. The Louisburg Motor Company had Champion sign application for title certificate on 16 January, 1925, and the certificate was issued in the name of Champion, saying there is a mortgage to Carolina Discount Corporation for $551.00.

"The title retained note and certificate of title were then transferred to Carolina Discount Corporation. Louisburg Motor Company in December, 1924, took a second mortgage from Champion for $85.00 balance of the price, which was not recorded or mentioned in the certificate of title.

"J. B. Champion on 21 February, 1925, sold the Ford coupé to Landis Motor Company in Henderson for full value, representing that it was his, free of encumbrance, and that he had the certificate of title at his home in Franklin County in his trunk and he took with him an addressed envelope in which to return the transferred certificate to Landis Motor Company."

The following judgment was rendered:

"This action being heard at this term on appeal from the judgment of the recorder of Vance County, and being heard by his Honor on facts agreed on by the parties, the court doth adjudge that plaintiff is not entitled to recover the car sued for, and on motion of defendant the plaintiff is nonsuited. Defendant recovers costs of plaintiff's surety."

The plaintiff appealed and assigned error as follows:

"First Exception: To the failure of the court to hold that the certificate of title issued by the Secretary of State entitled the holder thereof to the automobile in question.

"Second Exception: To the failure of his Honor to hold that the transfer of the certificate of title issued by the Secretary of State was necessary in order to give the transferee of the automobile title to the same.

"Third Exception: To the holding by the court in effect that possession of the car by the holder of the automobile without title from the Secretary of State was valid as against the plaintiff who had a proper title as provided for by law.

"Fourth Exception: To the failure of the court to hold that the registration of the title with the Secretary of State of North Carolina, with encumbrances thereon, was sufficient notice to prospective purchasers of any liens or encumbrances thereon.

"Fifth Exception: To the judgment of nonsuit."

Willis Smith, J. P. and J. H. Zollicoffer for plaintiff.
T. T. Hicks & Son for defendant.

VARSER, J. Plaintiff contends that, now, and since, the adoption of chapter 236, Public Laws 1923, it is not necessary to register a mortgage covering motor vehicles, for that the provisions of section 2, chapter 236, Public Laws 1923, transfer to the Department of Revenue all the duties in regard to the registration of such chattel mortgages, and that the declaration of the owner, set out in the application for registration with the Commissioner of Revenue, showing the liens or encumbrances, is all that is necessary. This, if true, would make a radical change in the registration of chattel mortgages and take from all the counties, and transfer to the Department of Revenue, the many transactions represented in chattel mortgages covering motor vehicles.

The caption of chapter 236, Public Laws 1923, is broad and inclusive; it evinces the purpose to protect the title of motor vehicles; to provide for the issuance of certificates of title and evidence of registration thereof; to regulate purchase and sale or other transfer of ownership; to facilitate the recovery of motor vehicles stolen or unlawfully

taken; to provide for the regulation and licensing of certain dealers in used and second-hand vehicles, and to prescribe the powers and duties of the Secretary of State (now Commissioner of Revenue) under this act and to provide penalties for violation of its provision.

When the act, itself, is examined, it does not go as far as its caption would indicate a purpose to go. Section 2 provides that no certificate of registration or number plates for such vehicles shall be issued unless the applicant shall, at the time, make application for an official certificate of title, or shall present such satisfactory evidence that such certificate has been previously issued and allowing the registration officer to prescribe and furnish a form, and the applicant shall set out a full description of the motor vehicle on this official application form, containing the manufacturer's number, the motor number and any distinguishing marks, together with the statement of the applicant's title, and "of any liens or encumbrances upon said motor vehicle," and such other information as may be required. If the registration officer is satisfied that the applicant is the owner of such motor vehicle, or otherwise entitled to have the same registered in his name, he shall, thereupon, issue to the applicant an appropriate certificate of title over his signature, authenticated by his seal bearing a consecutive number, and the certificate shall contain such description and evidence of identification of the motor vehicle that such officer may deem proper, together with the statement of any liens or encumbrances, which the application may show to be thereon. Another provision is: "Said certificate shall be good for the life of the car as long as the same is owned or held by the original holder of such certificate, and need not be renewed annually, or at any other time, except as herein provided."

The caption, or title, may be resorted to when the terms of the act are not clear, but it cannot be used to extend the terms of the act beyond their clear meaning. *Freight Discrimination Cases*, 95 N. C., 434, 447. The language of the caption does not control the act. *S. v. Woolard*, 119 N. C., 779; *S. v. Bell*, 184 N. C., 701; *Weesner v. Davidson*, 182 N. C., 604; *In re Chisholm's Will*, 176 N. C., 211.

Section 3 requires that, "in the event of the sale or other transfer . . . of the ownership of the motor vehicle for which a certificate of title has been issued, as aforesaid, the holder of such certificate shall endorse on the back of same an assignment thereof, with warranty of title in form printed thereon, with a statement of all liens or encumbrances on said motor vehicle, and deliver the same to the purchaser or transferee at the time of delivery to him of such motor vehicle." The purchaser or transferee is then required, within a named time, to forward the transferred certificate to the Secretary of State, to the end that a new certificate shall be issued.

Section 4 prohibits the operation of motor vehicles unless application has been made for certificate of title, and makes its violation a misdemeanor, and declares that any person who sells a motor vehicle without complying with requirements of section 3, in regard to the application for a new certificate in case of sale or transfer, is guilty of misdemeanor. This action, however, concerns a mortgagee, and a purchaser for value, from a "person who sells."

A careful perusal of this act fails to disclose any provision prohibiting a sale or transfer of the title of a motor vehicle without a transfer and delivery of a certificate of registration of title, and there is no provision that a sale so made is either fraudulent or void. Its provisions operate upon the parties who make a sale or a purchase without complying with its terms. Its penal provisions are clear. They are directed against those who violate after the sale, or transfer, has been made.

This statute is a police regulation to protect the general public from fraud, imposition and theft of motor vehicles. The registration statute, C. S., 3311, 3312, specifically protects mortgagees.

Inasmuch as this act contains provisions of a highly penal nature, and, although it is within the police power, the courts will not, by construction, extend its penal provisions unless the case comes within the letter of the law, and within its meaning and palpable design. *Finance Co. v. Hendry,* 189 N. C., 549, 553.

A sale of personal property is not required to be evidenced by any written instrument in order to be valid. This rule had been of such long standing prior to the enactment of the Motor Vehicle Registration Act, we cannot assume that the Legislature intended to change this rule, unless it says so. Statutes relating to the same subject-matter, and not in conflict, are to be construed *in pari materia,* so as to effectuate all and not work a repeal by implication, unless they are so repugnant and *contrariant* that such a construction cannot be had. The law does not favor a repeal by implication. There must be an intention to repeal the former act or such a repugnance that both cannot stand. *Jones v. Ins. Co.,* 88 N. C., 499; *S. v. Sutton,* 100 N. C., 474, 476; *S. v. Monger,* 111 N. C., 675, 679.

Therefore, we hold that the provisions of C. S., 3311, 3312 are not affected or repealed by chapter 236, Public Laws 1923, as amended, and that all chattel mortgages and conditional-sale contracts on motor vehicles must be registered in the county in which the mortgagor resides, and in case the mortgagor resides out of the State, then in the county where the said motor vehicle is situated, in order to obtain immunity against the creditors and purchasers for value, from the mortgagor. The conditional-sale contract, purchased by the plaintiff, never having been registered, is invalid as against the defendant, a purchaser for full value.

It is well settled that "no notice, however full and formal, will supply the place of registration." *Piano Co. v. Spruill,* 150 N. C., 168, and the wealth of authorities therein cited.

In *Piano Co. v. Spruill, supra,* McConnico gave Spruill a chattel mortgage on a piano, and the mortgagee registered this chattel mortgage. A conditional-sale agreement for the balance due on the purchase price was not registered, and the chattel mortgage recited that the piano was free and clear of all encumbrance, except $115 now due the piano company. This was held not to affect the right of the mortgagee in the chattel mortgage. The case at bar can have no stronger equity for plaintiff than this. The registration laws are provided for the protection of the grantees, and when not used, creditors and purchasers for value who have been diligent to comply with the law, are entitled to its protection.

It does not appear that the plaintiff has had possession, at any time, of the automobile in controversy, so as to come within the provisions of *Cowan v. Dale,* 189 N. C., 684. It appears that the defendant purchased from Champion the motor vehicle in controversy, and paid full value and took steps to have the certificate of title forwarded to it by Champion, but Champion did not so forward it to the defendant. The plaintiff already held the certificate of title, but Champion did not disclose this fact to defendant. It was not necessary for the plaintiff to have this certificate of title in order to protect its debt. Its duty was, if it desired protection, to have it registered in the county of Champion's residence. Not having obeyed C. S., 3311, 3312, the plaintiff is not entitled to assert its mortgage against the defendant. Upon the facts agreed, the defendant is the owner of the motor vehicle in controversy. We see no reason why, upon proper application to the court, on the facts stated in this record, it would not be proper to direct the plaintiff to deliver its certificate of title to the defendant to the end that the defendant may comply with the law and obtain a new certificate.

Plaintiff cites *Miller v. Ins. Co.,* 230 Pac., 1030, from Kansas; *Curry v. Iowa Truck & Tractor Co.,* 187 N. W., 36, from Iowa; *Crandall v. Shay,* 214 Pac., 450, from California. These cases hold with much clarity of reasoning and support in numerous precedents, that the sale and transfer of title are void when the statute prohibits such unless in compliance with its requirements. *Miller v. Ins. Co., supra,* deals with the Missouri statute which says: "Any sale or transfer of such motor vehicle without complying with the provisions of this section shall be fraudulent and void." The provisions referred to are similar to the requirements in the North Carolina statute in detail.

In *Curry v. Iowa Truck & Tractor Co., supra,* the Iowa statute provides: "Until said transferee has received said certificate of registration, and has written his name upon the face thereof, delivery and title to said motor vehicle shall be deemed not to have been made and passed."

In *Crandall v. Shay, supra,* the quoted section of the statute is the same as in the *Curry case, supra,* with this in addition: "And said intended transfer shall be deemed to be incomplete and not to be valid or effective for any purpose."

The pivotal provision of the statutes in these cases are absent from our statute. The North Carolina statute contents itself with penal provisions, operative on the persons who violate them, including the prohibition of the use of the vehicle on the highways, and no more. Our Legislature could have provided, as did Iowa, Missouri and California, but it is clear that it did not, and we cannot extend the act beyond its provisions, however laudable the purpose, or beneficent the desired result.

When the act of sale, or transfer is forbidden by statute, the violation of a positive law cannot be a consideration of a valid contract (*S. v. Cox,* 268 S. W., 87, 37 A. L. R., 87), and the converse is equally true that, when the act of sale, or transfer, is not forbidden, then the contract may be valid.

Therefore, the judgment appealed from must be

Affirmed.

SWIFT & COMPANY ET AL. v. H. ETHERIDGE.

(Filed 30 September, 1925.)

1. Pleadings—Evidence—Contracts—Vendor and Purchaser—Warranty.

In the absence of proof as well as allegation in a suit upon a note given for fertilizers that the fertilizers were specially warranted for growing potatoes, a counterclaim based thereon cannot be recovered against the seller, the plaintiff in the action.

2. Same—Fertilizers—Statutes—Consideration—Caveat Emptor.

The requirements of our statute, C. S., 4697, with regard to fertilizers sold in North Carolina, requiring an analysis by the State Chemist and the branding accordingly of the bags or packages in which they are delivered to the purchaser, is to prevent the sale of worthless fertilizer, and where in an action upon a note given therefor it is established that the fertilizer given in consideration of the note is worthless, there is a failure of consideration, and the plaintiff, the seller thereof, may not recover upon the note notwithstanding there was no express warranty as to the quality of the goods in the contract of sale, and the common-law rule of *caveat emptor* has no application. C. S., 4690.

SWIFT *v.* ETHERIDGE.

APPEAL by plaintiff from *Cranmer, J.*, at March Term, 1925 of PASQUOTANK. New trial.

Action upon note, dated at Harbinger, N. C., 13 May, 1922, executed by defendant, payable to order of plaintiff, for value received in fertilizers. Execution and delivery of the note is admitted in the answer.

As a defense to plaintiff's cause of action upon said note, defendant, in his answer, says "that the note set out in the complaint is without consideration; that the fertilizers which defendant purchased of the plaintiff, Swift & Company, and its agent set out above, is worthless; that the defendant purchased it, had his lands well prepared for potatoes, had obtained good seed potatoes and placed the fertilizer on the lands in proper condition, and properly placed and cultivated the potatoes thereon; that the said fertilizer was absolutely worthless, and of no value or benefit to the crop; that the said fertilizer was sold to defendant for potato fertilizer, and such that would be suitable for the potatoes, and with the representation that it had the proper ingredients to produce good potatoes and to produce them for early market; that in truth and in fact, the fertilizer did not have these ingredients; that it did not produce the potatoes nor advance them for the early market, and that the consideration for the note as aforesaid was nothing except the said fertilizer, and that the defendant owes to the plaintiff nothing by reason thereof."

As a counterclaim to plaintiff's cause of action on said note, defendant avers that he purchased from plaintiff, during the spring of 1922, fertilizers; that he executed his note, payable to plaintiff, in the sum of $351, for the purchase price of said fertilizers, as set out in the complaint; that plaintiffs represented to defendant that said fertilizers were good fertilizers and suitable for potatoes; that it had the proper ingredients and would produce potatoes at an early date; that said fertilizers were not as represented, and that by reason thereof defendant was damaged in the sum of $351.

Plaintiffs, in reply to the counterclaim, deny that they made representations with respect to the fertilizer sold to defendant, as alleged by defendant, and rely upon the contract as set out in the note.

The issues tendered by defendant, and submitted by the court to the jury, were as follows:

1. Was the fertilizer, the consideration of the note, worthless?
2. What amount, if any, are plaintiffs entitled to recover?

The jury answered the first issue "Yes," and having so answered same, under the instructions of the court, did not answer the second issue. Plaintiffs moved that the verdict be set aside, for errors. Motion denied and plaintiffs excepted. Plaintiffs then moved for judgment on the pleadings and *non obstante veridicto*. Motion denied and plaintiffs

excepted. Judgment was thereupon rendered that plaintiffs take nothing by their action, and that defendant go without day and recover of plaintiffs his costs to be taxed by the clerk. Plaintiffs having excepted to this judgment, appealed to the Supreme Court. Assignments of error appear in the opinion.

Ehringhaus & Hall for plaintiffs.
Adylett & Simpson for defendant.

CONNOR, J. Defendant did not insist upon the counterclaim, as set up in his answer, at the trial of this action. He tendered no issues involving the matters relied upon in support of his counterclaim. There was neither allegation nor proof that the fertilizers purchased by defendant of the plaintiffs had been subjected to a chemical analysis, showing a deficiency of ingredients, which is made, by statute, a prerequisite to a suit for damages, resulting from the use of the fertilizers; C. S., 4697. Defendant could not, therefore, have maintained an action to recover such damages; *Jones v. Guano Co.,* 183 N. C., 338, 264 U. S., 171, 68 L. Ed., 623. Nor could he, without such allegation and proof, have maintained a counterclaim for such damages; *Fertilizing Co. v. Thomas,* 181 N. C., 274; *Pearsall v. Eakins,* 184 N. C., 291. There is no provision in the contract between the parties to this action abrogating the statutory requirement. Defendant was, therefore, well advised when he did not insist upon the counterclaim.

The only defense, relied upon by defendant, is failure of consideration for the note sued upon. He admitted the execution of the note, as set out in the complaint, but alleged that the fertilizers delivered to him, pursuant to the contract of sale, which were the consideration for the note, were worthless. This note contains a clause in words as follows:

"The consideration of this note is commercial fertilizers sold to the undersigned without any warranty as to results from its use, or otherwise. Said fertilizers have been inspected, tagged and branded under and in accordance with the laws of this State."

By these words, included in the note signed by him, defendant admits that there was no express warranty by plaintiffs as to results from the use of the fertilizers or otherwise. He is thereby precluded from alleging or contending that there was any express warranty, for the breach of which he is entitled to damages. Indeed, upon the trial, he made no such contention.

The rule of *caveat emptor,* as applied at common law in the sale of articles of personal property, is not applicable to the sale of commercial fertilizers in this State. "By the common law, the vendor is not bound to answer to the vendee for the quality or goodness of the

articles sold, unless he expressly warrants them to be sound and good, or unless he knew them to be otherwise, or unless they turn out to be different from what he represents them to the buyer; in other words, there must be either an express warranty or fraud, to make the vendor answerable for the quality or goodness of the articles sold." 11 C. J., 43, note b. In this jurisdiction, however, the harshness of the rule of *caveat emptor,* when strictly applied, is modified and mitigated by the doctrine of implied warranties, which is based upon the presumption that men who receive something of value in commercial transactions intend to give, in return, something of value. "It is well settled," says *Justice Brown,* in *Grocery Co. v. Vernoy,* 167 N. C., 427, "that on a sale of goods by name, there is a condition implied that they shall be merchantable and salable under that name; and it is of no consequence whether the seller is the manufacturer or not, or whether the defect is hidden or might possibly be discoverable by inspection." *Justice Allen,* in *Ashford v. Shrader,* 167 N. C., 45, and *Justice Walker* in *Medicine Co. v. Davenport,* 163 N. C., 297, approve the principle as stated in Benjamin on Sales, secs. 683 and 686, in the following words: "If a man sell an article, he thereby warrants that it is merchantable; that is, fit for some purpose. If he sells it for a particular purpose, he thereby warrants it to be fit for that purpose."

It is contended, however, that the words "or otherwise," negative, not only an express warranty by contract between the parties, but also any warranty implied by law, in accordance with the principle above stated. This contention does not commend itself to us as consistent with the honesty of purpose with which plaintiffs are entitled to be credited in their dealings with their customers. The law presumes an honest purpose on the part of plaintiffs in the conduct of their business, in this State, as manufacturers and sellers of commercial fertilizers. It will not presume a purpose to collect from customers the contract price for articles sold, regardless as to whether they are worthless or not. Plaintiffs sold and contracted to deliver to defendant commercial fertilizers; they seek in this action to recover the purchase price for the articles delivered pursuant to this contract. Plaintiffs did not guarantee the results from the use of the fertilizers, nor did they guarantee the quality or goodness of the articles sold. It was the duty of plaintiffs, however, to deliver to defendant, pursuant to the contract, commercial fertilizers. The law implies an undertaking by the plaintiffs to perform this duty. Plaintiffs will not be heard, when seeking to enforce rights under the contract, to say that they absolved themselves from the performance of the duty which the law imposed upon them when they made the contract with defendant.

In *Furniture Co. v. Mfg. Co.,* 169 N. C., 41, this Court held that the implied warranty that the article sold was at least merchantable or salable, and was fit for the purpose for which it was sold, was not affected by express notice to the purchaser that the vendor would not guarantee the *condition* of the article sold. *Justice Allen,* writing the opinion for the Court, says: "The refusal to guarantee condition means only a refusal to warrant as to quality, and although the law writes this into every contract for the sale of personal property—that in the absence of express agreement there shall be no warranty as to quality—it holds the seller to the duty of furnishing an article merchantable or salable or that can be used. If so, why should the obligation of the seller be less because he writes in the contract what the law would place there? In other words, if the law writes into a contract of sale, that there is no warranty as to the quality of the goods sold, and still holds the seller to the duty of furnishing an article that is merchantable or salable, or one that can be used, why does not the same duty rest upon the seller when he, instead of the law, writes into the contract that he will not warrant the quality"; *Register Co. v. Bradshaw,* 174 N. C., 414. *Machine Co. v. McClamrock,* 152 N. C., 406, cited in plaintiff's brief, is not an authority to the contrary of this proposition. It is there said that "it cannot admit of doubt that personal property may be sold with or without warranty, and that from an express stipulation that the property is not warranted a warranty will not be implied." The property which was the subject-matter of the contract involved in that action was second-hand machinery, which was "not warranted." The property sold and delivered was second-hand machinery. The controversy was as to the quality of this machinery, and it was held that in the absence of an express warranty, evidence of inferior quality was inadmissible. It was held that there was no implied warranty as to the quality of the article sold. The use of the words "or otherwise" in the note sued on in this action, did not absolve plaintiffs from the duty to deliver to defendant commercial fertilizer, with the warranty implied by law that the goods sold and delivered were merchantable, or salable, and fit for the purpose for which they were bought.

In addition to the duty imposed by law upon plaintiffs, as manufacturers and sellers of articles of personal property, under the principle of implied warranty, there is the duty imposed by statute upon them as manufacturers and sellers of commercial fertilizers. C. S., 4690 makes it the duty of all persons, companies, manufacturers, dealers or agents, before selling or offering for sale in this State, any commercial fertilizer, to brand or attach to each bag, barrel or package, the brand name of the fertilizer, the weight of the package, the name and address of the

manufacturer and the guaranteed *analysis of the fertilizer,* giving the valuable constituents of the fertilizer in minimum percentages only, and also, the sources of nitrogen or ammonia and potash. The purpose of this statute is to protect the public from the sale of worthless fertilizers; *S. v. Oil Co.,* 154 N. C., 635.

When plaintiffs as manufacturers, dealers or agents sold to defendant commercial fertilizers, they must be held to have warranted that they had complied with the statute, and that the articles delivered, as commercial fertilizers were truthfully branded as required by the statute. Among other things the statute requires that the "guaranteed analysis of the fertilizer, giving the valuable constituents of the fertilizer in minimum percentages only," shall appear on each bag or package. No commercial fertilizers may be sold in this State without a guarantee of the analysis claimed by the manufacturer. Plaintiffs, therefore, when they delivered to defendants the articles purchased by him as commercial fertilizer, in accordance with the statute, warranted that the contents of the bags or packages, were not only commercial fertilizers, but also were of the guaranteed analysis as appeard on the bag or package.

If the contents of the bags or packages delivered to defendant by plaintiffs were not, in fact, commercial fertilizers, of the analysis guaranteed on each bag or package, as required by statute, there was no consideration for the note, given for the purchase price of the articles bought by defendant, and plaintiffs are not entitled to recover on said note. Total failure of consideration is a defense in an action upon a note between the original parties thereto, C. S., 3008. *Jewelry Co. v. Stanfield,* 183 N. C., 10; 3 R. C. L., 942, sec. 138 and authorities cited. The note sued on in this action is a negotiable instrument and is deemed prima facie to have been issued for a valuable consideration, C. S., 3004. The burden is on defendant, who admits the execution and alleges failure of consideration, to rebut the presumption arising from the character of the note; *Piner v. Brittain,* 165 N. C., 401; *Hunt v. Eure,* 188 N. C., 716. This burden may be sustained by parol evidence.

There was no error in the refusal to render judgment on the pleadings, or judgment *non obstante veridicto.*

Plaintiff excepted to the first issue tendered by defendant, and submitted to the jury by the court. This issue was as follows:

"Was the fertilizer, the consideration of the note, worthless?"

If a purchaser gets from his vendor the very article which was the subject-matter of the contract of sale, and there is no express warranty as to quality or no fraud or deceit, he cannot defend an action for the purchase price solely upon the allegations and proof that the article was worthless. *Fair v. Shelton,* 128 N. C., 105. If, however, the article

delivered to the purchaser by his vendor is not the article, which was the subject-matter of the contract, it cannot be said that the purchaser received value for the purchase price, and an action may be successfully defended upon the ground of failure of consideration. The fact, alone, that the article delivered is worthless, is not sufficient to support the defense of failure of consideration. Plaintiff's right to recover upon the note in this action is not to be determined solely by whether or not the fertilizers, the purchase price of which was the consideration of the note, were worthless, in that they did not produce good potatoes for the early market. There was no warranty as to the results of using the fertilizers sold, under defendant's crops. There was a warranty implied by law, that the articles delivered to defendant were commercial fertilizers; there was also the warranty required by statute, that the commercial fertilizers sold were of the guaranteed analysis, as appeared upon the box or package. The breach of the implied warranty and of the statutory warranty, although no demand is made for damages for such breach, is competent evidence upon the issue as to failure of consideration. It is not necessary in order to prove failure of consideration, that there should be a chemical analysis; *Carter v. McGill,* 168 N. C., 507. The issue, arising upon the pleadings, which will be determinative of this action, is substantially, "Did plaintiffs fail to deliver to defendant commercial fertilizers, of the analysis guaranteed on the bags, in accordance with their contract?"

It may be noted that there are no provisions in the contract between the parties to this action which differentiate their contract from other contracts for the sale of articles of personal property. The fact that commercial fertilizers are the subject-matter of the contract does not affect the character of evidence competent to be heard by the jury upon the issue. There is no demand for compensation for deficiency of ingredients; nor are damages from results of using the fertilizers sought. The controversy is as to the identity of the articles delivered with the articles sold. Defendant contends that plaintiffs did not deliver to him the articles which he bought and which plaintiffs contracted to sell and deliver to him. If this allegation is true, there was no consideration for the note sued on. The issue submitted, to which plaintiffs excepted, does not present this question. The exception was well taken, and the assignment of error based thereon must be sustained.

We do not pass upon or discuss other assignments of error, which are based upon exceptions to evidence upon the issue erroneously submitted. There must be a

New trial.

J. B. COLT COMPANY v. J. E. KIMBALL.

(Filed 30 September, 1925.)

1. Pleadings—Fraud—Allegations.

In order to avoid a contract on the ground of its procurement by fraud, the pleadings must allege the facts sufficient to constitute the fraud so that this sufficiency may be passed upon by the court, and the pleader's conclusion of law alone is not sufficient to admit his evidence upon the trial.

2. Contracts—Evidence—Fraud.

Where a written contract of sale excludes parol evidence by its express terms, evidence on behalf of the purchaser that he was prevented from reading and understanding it because of fine print therein he could not read without his spectacles at the time he signed it, is insufficient to show its procurement by the fraudulent representations of the seller's sales agent.

3. Vendor and Purchaser—Carriers of Goods—Delivery—Questions for Jury—Questions of Law.

Where the goods contracted to be sold are not required by the contract or agreement to be delivered to the purchaser, a delivery by the seller to the railroad company when such is contemplated is, nothing else appearing, a delivery to the consignee so far as the consignor's liability is concerned; and where there is no express agreement as to when delivery shall be made, the law presumes that it will be done in a reasonable time, which raises a mixed issue of law and fact for the jury, unless it appears by admissions or otherwise, that such delivery was either without delay or unduly delayed, when the question is one of law alone for the judge to determine.

APPEAL by plaintiff from VANCE Superior Court. *Devin, J.*

Action by plaintiff to recover of the defendant the purchase price of a gas-lighting equipment. From a judgment on a verdict for defendant, plaintiff appeals. New trial.

The verdict is as follows:

"Is the defendant indebted to the plaintiff, if so, in what amount? Answer: Nothing."

The plaintiff declared upon a written contract to purchase an acetylene gas-lighting plant for residential use, in the sum of $267.50. The defendant alleged that, on 2 March, 1920, plaintiff's agent promised him that the lighting outfit would be delivered to defendant, on his premises, not later than 60 days from that date, and that the contract was based on this promise. The defendant further alleged that, "the contract . . . was not read to this defendant, but was, through fraud and misrepresentation by the agent of the plaintiff, executed by this defendant."

The defendant admitted that he agreed to pay the plaintiff $267.50 only upon the strict compliance of the contract as agreed by plaintiff, and denies that the articles purchased have been delivered to him, and he said they never reached Townsville, North Carolina.

The defendant further says that, he, "through fraud and misrepresentation of the plaintiff, signed the contract attached to said complaint herein, and that this defendant never read the contract and does not believe he was given the opportunity to do so."

The plaintiff excepts for that the court below admitted evidence on behalf of the defendant, as follows: That the defendant was allowed to state that, as an inducement for him to sign the agreement of sale, plaintiff's agent told him they were going to put the lighting plant up in 30 days, and it would not be more than 60 days before his house would be lighted, and allowing the defendant to state that the contract read at the trial, does not embody the agreement which he had with the plaintiff's agent, and to state that the defendant was not to give note.

The plaintiff contended that this evidence was incompetent on account of the provisions in the contract which are as follows:

"It being understood that this instrument, upon such acceptance, covers all of the agreements between the purchaser and the company, and that no agent or representative of the company has made any statements or agreements verbal or written modifying or adding to the terms and conditions herein set forth. It is further understood that upon the acceptance of this order the contract so made cannot be altered or modified by any agent of the company or in any manner except by agreement in writing between the purchaser and the company acting by one of its officers." This case was tried below upon the assumption that there was no dispute about the acceptance of the contract by plaintiff.

The plaintiff further excepted for that the court submitted to the jury defendant's contention that he signed the paper which he was fraudulently induced to believe as something else than now appeared, and to the charge that, if the defendant has satisfied the jury that the signature to the contract was procured by fraud, then he would not be responsible for it or compelled to accept it, and to the charge that the defendant would be bound by the contract; it was his duty to read it or have it read for him, "unless the other party did something to mislead him to prevent him from finding out what was in the paper he was signing." And in submitting defendant's contention that plaintiff's agent agreed to have the plant there in 60 days and to be installed, and also submitting the defendant's contention that he was fraudulently induced to sign the contract.

From a judgment on the verdict in favor of the defendant, plaintiff appealed.

Perry & Kittrell for plaintiff.
Kittrell & Kittrell, J. P. and J. H. Zollicoffer for defendant.

VARSER, J. Upon the defendant's pleading, it is apparent that fraud has not been sufficiently pleaded. It is accepted in this jurisdiction that the facts relied upon to constitute fraud, as well as the fraudulent intent, must be clearly alleged. *Bank v. Seagroves*, 166 N. C., 608; *Beaman v. Ward*, 132 N. C., 68, 71; *Anderson v. Rainey*, 100 N. C., 321, 334; *McLean v. Manning*, 60 N. C., 608; *Machine Co. v. Feezer*, 152 N. C., 516; *Merrimon v. Paving Co.*, 142 N. C., 540. Fraud must be charged positively, and not by implication. *Foy v. Stephens*, 168 N. C., 438. The presumption is always in favor of the pleader (*Dixon v. Green*, 178 N. C., 205), and when the necessary ingredients of fraud are plainly set out, the word "fraud" need not be used. *Galloway v. Goolsby*, 176 N. C., 635. Fraud must be charged so that all its necessary elements appear affirmatively. *Nash v. Hospital Co.*, 180 N. C., 59; *Marshall v. Dicks*, 175 N. C., 38; *Merrimon v. Paving Co., supra; Lanier v. Lumber Co.*, 177 N. C., 200, 205.

It is not sufficient to allege as a conclusion merely that the signature to the contract was procured by fraud and misrepresentation of plaintiff's agent. The facts must appear so that the court, itself, can see that these facts, if found to be true, do constitute fraud.

The defendant's evidence appearing in the record is not sufficient to constitute fraud if the proper allegations had been made. The evidence does not establish fraud in the procurement of the execution of the contract sued on, when viewed in the light most favorable to the defendant. He testifies, in his own behalf, on this phase of the case, "I refused to take it (the acetylene gas outfit) for awhile, and finally he said if I would take this plant he would install it in 30 days, certainly not more than 60 days. That is my name at the bottom of the contract. I cannot read the fine print in the contract. Agent did not tell me what was in it, told me it was a bill of sale, agreement of sale I was signing; said the installer would be there in 30 days. Do not think I asked agent to read agreement of sale to me. Agent did not tell me what it was I was signing. I did not ask him—just signed my name. I was to pay cash when it was installed, did not ask any time. As an inducement for me to sign the agreement of sale he told me they were going to put the lighting plant up in 30 days, and it would not be more than 60 days before my house would be lighted." The last sentence was objected to by plaintiff, but admitted.

The defendant further testified: "The agent led me to understand that the delivery in 30 days was in the contract. Could not say just what he said was in the contract, and I signed it thinking in 30 days I would have the plant. Did not know it was such a contract as it was or what conditions were in it. Agent did not do anything particular to keep me from reading the contract. Contract as read here today does not embody the agreement I had with the agent." This last sentence was admitted over objection.

The defendant testified: "I think I wrote my name to the contract. Am on the board of education of Vance County; have been for 12 or 15 years. I farm on rather a large scale, and my business experience has been wider than the average farmer. I am in the habit of the transaction of business. Contract was signed at my home. I could have gone off and gotten some one to read the contract to me. It would have taken stronger glasses than I have to read that fine print. If I had had any idea it was a contract like that I would have been dead sure to have had it read. I did not make any effort to have it read, only thought it was a sale agreement. The agent did not make any attempt to keep me from reading it. I suppose I have been educated above the average citizen of Vance County." This evidence does not establish fraud. *DeLoache v. DeLoache,* 189 N. C., 394, 400; *Beaman v. Ward, supra; Printing Co. v. McAden,* 131 N. C., 178; *Irvin v. Jenkins,* 186 N. C., 752. It is the defendant's duty to read the contract, or have it read to him, and his failure to do so, in the absence of fraud, is negligence, for which the law affords no redress. The defendant's duty to read or have read to him the contract, is a positive duty of which he is not relieved, except in cases of fraud. *School Committee v. Kesler,* 67 N. C., 443; *Dixon v. Trust Co.,* 115 N. C., 274; *Griffin v. Lumber Co.,* 140 N. C., 514; *Dellinger v. Gillespie,* 118 N. C., 737; *Bank v. Redwine,* 171 N. C., 564; *Taylor v. Edmunds,* 176 N. C., 327; *Newbern v. Newbern,* 178 N. C., 4; *Currie v. Malloy,* 185 N. C., 215; *DeLoache v. DeLoache, supra; Harvester Co. v. Carter,* 173 N. C., 229. Therefore, it was error to admit the evidence over plaintiff's objection. *Farquhar Co. v. Hardware Co.,* 174 N. C., 369; *Moffitt v. Maness,* 102 N. C., 457; *Murray Co. v. Broadway,* 176 N. C., 151. This principle lies at the very foundation of all contracts. Its violation, if permitted by the courts, would strike down one of the safeguards of commercial dealing. The resultant injury would be far reaching. The integrity of contracts demands its universal enforcement. *Potato Co. v. Jenette,* 172 N. C., 3.

Defendant's testimony shows that he is a man of education and prominence, accustomed to the transaction of business, and of much experience, with more than an average education; who has served on the board of education for Vance County for many years. It was his duty,

unless fraudulently prevented therefrom, to read the contract, or, in case he was not able to read the fine print without stronger glasses, to have it read to him. This rule does not tend to impeach that valuable principle which commands us to treat each other as of good character, but rather enforces along with it, the salutary principle that each one must "mind his own business" and exercise due diligence to know what he is doing.

Having executed the contract, and no fraud appearing in the procurement of the execution, the Court is without power to relieve the defendant on the ground that he thought it contained provisions which it does not. He is concluded thereby to the same extent as if he had known what due diligence would have informed him of, to wit: its plain provisions that the agent had no authority to make agreements other than those contained therein, and that such agreements, if made, were not a part of the contract. *Leonard v. Power Co.*, 155 N. C., 10; *Machine Co. v. Feezer, supra; Wright v. R. R.*, 125 N. C., 1; *Thomas v. Cooksey*, 130 N. C., 148; *Griffin v. Lumber Co.*, 140 N. C., 514; *Dellinger v. Gillespie, supra; Hayes v. R. R.*, 143 N. C., 125; *Floars v. Ins. Co.*, 144 N. C., 241; *Dixon v. Trust Co., supra; Medlin v. Buford*, 115 N. C., 260.

The defendant, however, contends that plaintiff is not entitled to recover for that the delay in shipping the purchased articles was unreasonable, and that he is relieved thereby. An inspection of the record discloses that the trial in the court below was not had upon this phase of the case. The plaintiff contends that, on account of strikes affecting all railroads running out of Chicago, it was not responsible for this delay. The contract, however, requires plaintiff to ship to the defendant at Townsville, North Carolina, and does not provide for relief on account of strikes. The contract requires plaintiff to ship to defendant, at Townsville, N. C., f. o. b. factory or warehouse, and does not require of plaintiff a delivery at Townsville, N. C. A delivery to the common carrier at the factory or warehouse, consigned to defendant as an "open" shipment, would be a delivery to defendant, *Hunter v. Randolph*, 128 N. C., 91; *Buggy Corporation v. R. R.*, 152 N. C., 121; *Pfeifer v. Israel*, 161 N. C., 414; *Grocery Co., v. R. R.*, 170 N. C., 246; *S. v. Blauntia*, 170 N. C., 749, 751; *Wooley v. Bruton*, 184 N. C., 440, if *such delivery is within a reasonable time.*

The rule is that when the contract does not specify the time for delivery, a reasonable time will be implied as a matter of law. *Waddell v. Reddick*, 24 N. C., 429; *Hurlburt v. Simpson*, 25 N. C., 233; *Winders v. Hill*, 141 N. C., 704; *Michael v. Foil*, 100 N. C., 178. This same rule has been applied to timber leases when no time is specified for the cutting and removal. *Bunch v. Lumber Co.*, 134 N. C., 116.

This rule also obtains in Arkansas (*Long v. Abeles*, 91 S. W., 29); Delaware (*Walker v. Taylor*, 4 Pennew, 118); Georgia (*Pratt Co. v. Gin Co.*, 119 Ga., 851); Illinois (*Cayne v. Avery*, 189 Ill., 378); Iowa (*Holt v. Brown*, 63 Iowa, 319); Maryland (*Bagby v. Walker*, 78 Md., 239); Michigan (*Bollenbacher v. Reid*, 155 Mich., 277); Minnesota (*Palmer v. Breen*, 34 Minn., 39); Missouri (*Smith v. Shell*, 82 Mo., 215); Nebraska (*McGinnis v. Johnson Co.*, 74 Nebr., 356); New York (*Browne v. Paterson*, 165 N. Y., 460); Pennsylvania (*Muskegon Co. v. Keystone Mfg. Co.*, 135 Pa., 132); Texas (*Ullman v. Babcock*, 63 Tex., 68); Virginia (*Smith v. Snyder*, 82 Va., 614); West Virginia (*Boyd v. Gunnison*, 14 W. Va., 1); Wisconsin (*Lippert v. Saginaw Milling Co.*, 108 Wis., 512); England (*DeWall v. Adler*, 12 App. Cases, 141); Canada (*Ballantyne v. Watson*, 30 U. C. C. P., 529).

What is a "reasonable time" in which delivery must be made is generally a mixed question of law and fact, and, therefore, for the jury, but when the facts are simple and admitted, and only one inference can be drawn, it is a question of law. *Blalock v. Clark*, 137 N. C., 140; *Claus v. Lee*, 140 N. C., 552; *Holden v. Royall*, 169 N. C., 678; *Moore v. Express Co.*, 181 N. C., 302; *Jeanette v. Hovey*, 184 N. C., 142; *Kernodle v. Telegraph Co.*, 141 N. C., 439; *Davis v. Thornburg*, 149 N. C., 234; *May v. R. R.*, 151 N. C., 388. Where the delay is so great as to support only one inference in the minds of all reasonable persons, then it is clearly the duty of the trial court to declare it unreasonable as a matter of law. *May v. R. R., supra.*

The seller, in order to recover the purchase price must show performance on his part. This places on him the burden of proof to show that a tender, or a delivery, of the goods purchased was made within a reasonable time, or that the buyer has waived the same. *Eppens v. Littlejohn*, 164 N. Y., 187, 52 L. R. A., 811; Mechem on Sales, 2 Vol., 970; *Greenbrier Lumber Co. v. Ward*, 36 W. Va., 573; *Boyd v. Gunnison, supra; Bolton v. Riddle*, 35 Mich., 13; *Stange v. Wilson*, 17 Mich., 342; *American Extract Co. v. Ryan*, 104 Ala., 267; *Dennis v. Stoughton*, 55 Vermont, 371; *Pope v. Mfg. Co.*, 107 N. Y., 61; Benjamin on Sales, 891 (note); *Claus v. Lee, supra; Hester v. Cole*, 31 N. C., 23; *Grandy v. McCleese*, 47 N. C., 142; *Cowper v. Saunders*, 15 N. C., 283; *McCurry v. Purgason*, 170 N. C., 463, 468; *Davidson v. Furniture Co.*, 176 N. C., 572; *Edgerton v. Taylor*, 184 N. C., 579.

It was error to admit the evidence as to the alleged oral agreements with plaintiff's agent, and to submit to the jury the question of fraud. However, in order that the question as to whether plaintiff has complied with its contract by shipping the goods purchased within a reasonable time after the execution and acceptance of defendant's contract, in accordance with the rule herein announced, it is ordered that there be a New trial.

J. P. TAYLOR v. FIRST NATIONAL BANK OF SNOW HILL ET ALS.

(Filed 30 September, 1925.)

Bills and Notes—Payment—Intent—Evidence—Questions for Jury—Nonsuit.

Where the evidence is conflicting as to the intent of the parties to include a mortgage note in one given in a larger transaction, releasing the mortgage security, the question is one for the determination of the jury, and defendant's motion as of nonsuit thereon is erroneously granted.

APPEAL by plaintiff from *Barnhill, J.*, at February Term, 1925, of GREENE. Reversed.

Langston, Allen & Taylor for plaintiff.
J. Paul Frizzelle for defendant.

CLARKSON, J. (1) On 18 September, 1918, B. W. Pate and wife executed and delivered to plaintiff, J. P. Taylor, a note for $7,000 balance of purchase money on land and secured same by a mortgage made on the land. This mortgage was filed for registration on 17 April, 1920 and recorded in the register of deeds office for Greene County, N. C., in Book 125, p. 452.

(2) On 24 March, 1919, B. W. Pate and wife executed and delivered a note, and secured same by a mortgage on the same land, to H. F. Edwards, administrator, for $1,541.16. This mortgage was filed for registration and recorded on 25 March, 1919, in the register of deeds office for Greene County, N. C., in Book 116, p. 289.

(3) The First National Bank of Snow Hill, the defendant in this action, on 7 April, 1919, purchased the H. F. Edwards, administrator, note, secured by mortgage before mentioned, paying him the sum of $1,636.70.

(4) On 20 December, 1920, B. W. Pate, who was indebted to the said defendant, the First National Bank of Snow Hill, in certain amounts, to secure said indebtedness of $3,364.13, made two notes secured by deed in trust, (his wife joining in) one for the Edwards debt including interest $1,710.16, and the other the unsecured bank debt for the sum of $3,364.13. This deed in trust was immediately filed for record in the office of the register of deeds for Greene County and recorded in Book 131, p. 204.

To the above facts the parties are agreed, but on the record plaintiff contends that certain facts and circumstances show a settlement between the parties of the Edwards debt. That the bank took a deed in trust from B. W. Pate and wife and included in it a note for $1,710.16, the

Edwards debt, secured by prior mortgage, and delivered the prior mortgage to the mortgagor. That the bank record cash journal of 21 December, 1920, is as follows:

"No. 3920—$1,636.70 and 5994 shows the new note from same party—from Mr. B. W. Pate—$1,710.16. The cashier, at the time, of the defendant bank, testified, in part:

"The bank records offered in evidence show the Edwards note paid at $1,636.70 and show a new note given by B. W. Pate and put in record of that date as a bill receivable. Our records show the old note paid and a new loan of the same date to the party giving the renewal. In taking renewals, we retain the original note; we do not cancel the old note, but run it through the records in order to take the renewal into account.

"Q. If a person owed you a note maturing today and he went in and renewed it, how would you handle it? Answer: On the debit side of the journal as a loan made, and on the credit side as a loan paid."

There were other facts and circumstances substantiating plaintiff's contention.

On the other hand, defendant contends that the facts and circumstances show that there was no settlement as to the Edwards debt. That the note secured by the mortgage was never delivered to Pate the mortgagor. That Pate who made the note to Edwards, that defendant bank purchased, and who owed the debt testified:

"Q. Was there any agreement they would cancel and surrender that note to you? Answer: No, sir."

There were other facts and circumstances substantiating defendant's contention.

At the close of plaintiff's evidence, "defendant moved for judgment as of nonsuit and declared the First National Bank the holder of the first mortgage and the motion allowed," and the plaintiff duly excepted and assigned error.

We will treat the nonsuit merely as declaring that what is known as the "Edwards note and mortgage" a first lien. From the record we think the court below was in error in granting the nonsuit. The evidence was conflicting. The matter should have been left to the jury to determine the intention of the parties. *Joyner v. Stancill,* 108 N. C., 153; *Terry v. Robbins,* 128 N. C., 140; *Dawson v. Thigpen,* 137 N. C., 462; *Bank v. Knox,* 187 N. C., 565; *Saleeby v. Brown, ante,* 138.

In *Bank v. Hall,* 174 N. C., 477, *Brown, J.,* said: "It is well settled that a renewal note is not payment of the original indebtedness unless so intended. 7 Cyc., 877; *Kidder v. McIlhenny,* 81 N. C., 123; *Hyman v. Deverux,* 63 N. C., 624; *Wilkes v. Miller,* 156 N. C., 428."

In the present case, the note is retained by the bank and the mortgage surrendered to the mortgagor. Under the facts and circumstances of this case, the conflicting evidence should be passed on by a jury to determine what was the intention of the parties.

It is said in 1 Jones on Mortgages (6 ed.), sec. 926: "Whether a new note shall be treated and have effect between the parties as a payment of a former one for which it is submitted, will depend upon the purpose and understanding of the parties to the transaction; but not only will the intention of the parties be determined by the express agreement of the parties, but, in the absence of this, by the circumstances attending the transaction from which such intention may be inferred. . . . In the absence of any express agreement and of any circumstances showing intention, the renewal of the note does not affect the security. The burden is upon the mortgagor to show the existence of an agreement that the mortgage lien should be released upon the execution of the new note, and not upon the mortgagee to show an agreement that the mortgage should continue as a security for the debt covered by the new note." *Ibid.*, sec. 929. Again, "The taking of further security for the mortgage debt, whether it be by a second mortgage upon the same land, or real or personal security upon other property, is generally no waiver of the original mortgage." *Dawson v. Thigpen, supra*, p. 470.

19 R. C. L., part sec. 222:

"And the doctrine is well settled by authority in relation to mortgages that if the amount due thereon is paid, the intent of the parties in making the payment, whether to extinguish or keep alive the security, will ordinarily govern. As a general rule, a mere change in the form of the evidence of indebtedness will not operate to discharge a mortgage given to secure a debt, unless it is apparent that the parties so intended."

For the reasons given, the judgment below is

Reversed.

STATE v. VICTOR KLINE.

(Filed 30 September, 1925.)

Criminal Law—Assault and Battery—Statutes—Instructions—Expression of Opinion.

On a trial under a criminal indictment the burden is on the State to show beyond a reasonable doubt the ingredients or elements necessary to constitute the statutory offense, or the lower degree of the same crime for which a verdict is permissible and where assault and battery, prohibited by C. S., 4213, are charged, the State must accordingly

show that it was maliciously done with a deadly weapon, secretly by waylaying or otherwise, etc., with intent to kill, and when the evidence is conflicting, it is an expression of opinion inhibited by C. S., 564, for the judge to charge the jury that if they believe the evidence, a cold-blooded and cruel assault had been committed.

APPEAL by defendant from *Bond, J.*, at May Term, 1925, of LEE.

Criminal prosecution, tried upon an indictment charging the defendant with a malicious, secret assault in violation of C. S., 4213.

From an adverse verdict and sentence of three years in the State's prison, the defendant appeals, assigning errors.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

A. A. F. Seawell, W. D. Siler and H. F. Seawell for defendant.

STACY, C. J. The statute under which the defendant was indicted and convicted provides that if any person shall commit an assault and battery upon another (1) maliciously, (2) with a deadly weapon, (3) in a secret manner, by waylaying or otherwise, notwithstanding the person so assaulted may have been conscious of the presence of his adversary, (4) with intent to kill such other person, he shall be guilty of a felony and shall be punishable by imprisonment in jail or in the penitentiary (State's prison) for not less than twelve months nor more than twenty years, or by a fine of not exceeding two thousand dollars, or both, in the discretion of the court. C. S., 4213. In order to warrant a conviction under the statute, all of the essential elements of the crime must be proved by competent evidence (*S. v. Crisp*, 188 N. C., 800), and the burden is on the State to establish the defendant's guilt beyond a reasonable doubt, where a plea of "not guilty" is entered, as was done in the instant case. *S. v. Redditt*, 189 N. C., 176; *Speas v. Bank*, 188 N. C., p. 527.

It appears that on the night of 22 April, 1925, the prosecuting witness, Truby Proctor, was visiting at the home of J. F. Wicker, near Colon in Lee County. While there some one secreted himself in the rear of his automobile. The prosecuting witness left about 10:00 o'clock and was driving towards the public highway from the Wicker house, when the person in the rear of the car struck him over the head with an iron bar, inflicting serious injury upon him. Proctor testified that in the scuffle which followed, partly in the light of the automobile, he recognized the defendant as his assailant; that the defendant left the car, ran down the road, across the field and towards the woods.

The defendant testified that he was at the home of Mr. R. S. Kelly on the night in question; that he roomed there; that he knew nothing

of the occurrence until about 1:00 or 1:30 o'clock that night when he was aroused from his bed and charged with the offense.

The evidence was plenary on both sides. It was sufficient on behalf of the State to warrant a conviction and on behalf of the defendant to warrant an acquittal. The case was peculiarly one for the jury under proper instructions from the court.

The following paragraph, taken from the judge's charge, forms the basis of one of the defendant's exceptive assignments of error:

"Take the case—it is important. If the evidence is believed it was a terrible wrong which was done this young man, and a cold-blooded, cruel assault was committed upon him. On the other hand, it is highly important to the prisoner that no mistake be made. It is for you to say how you find the facts to be from the evidence in the case. Take the case, give it a fair and impartial trial, fair to both sides, recollecting all the evidence and recollecting the contentions of counsel, the different arguments made for the defendant, and after a proper consideration of all of it, return your verdict, and say whether you find, or not, under the instructions I have given you as to the burden of proof, the defendant is guilty or not guilty."

We think this instruction must be held for error on the present record. It would seem to be objectionable in two respects: In the first place, the characterization of the assault and battery as a "terrible wrong and a cold-blooded, cruel assault, if the evidence is believed," carries with it an expression of opinion that the act was done with the requisite felonious intent necessary to be shown on an indictment for a secret assault in violation of C. S., 4213, or at least the jury might well have so understood it. The defendant was charged with a malicious, secret assault, with a deadly weapon and with intent to kill the prosecuting witness, each and every essential element of which was put in issue by his plea of traverse. The burden was on the State to establish the defendant's guilt beyond a reasonable doubt; and although his counsel may have argued to the jury that a great wrong had been committed by some one, still this did not relieve the trial court from the duty of observing the statutory injunction against expressing an opinion as to whether a necessary fact had been fully or sufficiently proved. *S. v. Merrick,* 171 N. C., 788. The language of C. S., 564 is as follows:

"No judge, in giving a charge to the petit jury, either in a civil or a criminal action, shall give an opinion whether a fact is fully or sufficiently proven, that being the true office and province of the jury; but he shall state in a plain and correct manner the evidence given in the case and declare and explain the law arising thereon."

Under numerous decisions of the Court, dealing directly with the subject, this statute has been interpreted to mean that no judge, in giving

a charge to the jury or at any time during the trial, shall intimate whether a fact is fully or sufficiently proved, it being the true office and province of the jury to weigh the testimony and to decide upon its adequacy to establish any issuable fact. See *S. v. Hart,* 186 N. C., 582, and *Speed v. Perry,* 167 N. C., 122, where the statute, in all of its phases, is discussed at considerable length, with full citation of authorities. It would only be a matter of repetition to animadvert further upon the subject, and we content ourselves by a reference to what is said in these late cases.

Of course, the capable and painstaking judge who presided at the trial did not intend to prejudice the defendant's case. Not the slightest intentional wrong can be imputed to him. The error is one of those casualties which may befall the most circumspect in the trial of a cause on the circuit. It was no doubt induced by the manner in which the case was tried and the course pursued on the hearing. Such is a permissible inference from the record.

In the second place, this charge apparently withdrew from the jury's consideration any question of a conviction of "a less degree of the same crime," as authorized by C. S., 4640, when there is evidence tending to support a milder verdict, as was the case here, and such is permissible under the bill of indictment. *S. v. Allen,* 186 N. C., p. 307. The case presents a situation where the defendant is entitled to have the different views properly presented to the jury, and an error in this respect is not cured by a verdict convicting the defendant of the highest offense charged in the bill of indictment, for in such event it cannot be known whether the jury would have convicted of a less degree of the same crime if the different views, arising on the evidence, had been correctly presented to them by the trial court. *S. v. Williams,* 185 N. C., 685, and cases there cited.

The exception to the above instruction is well taken, and the defendant is entitled to a new trial. It is so ordered.

New trial.

MRS. L. R. ROOK v. MRS. W. R. HORTON.

(Filed 30 September, 1925.)

1. Dower.

The right of dower arises to the wife in the lands of her deceased husband as a matter of law, not arising by contract, and the widow does not take as a purchaser for value, and the principle that marriage is a valuable consideration does not apply.

2. Dower—Deeds and Conveyances—Registration.

A deed of gift of lands registered after the marriage or made thereafter, is not good as against the widow's right of dower, and the grantee therein is not a purchaser for value.

3. Deeds and Conveyances—Evidence—Recitals—Admissions.

The recitals in a deed from the common source of title of a valuable consideration paid for the lands, if uncontradicted by the evidence, is regarded as an admission of the parties.

4. Dower—Color of Title—Adverse Possession—Limitation of Actions.

The widow's dower in the lands of her deceased husband is but an elongation of his estate, and where this right is inchoate (during his life), the wife is not put to her action by his conveyance of the land, and the same is not color of title until his death, and may not be ripened into an indefeasible title by adverse possession prior thereto.

5. Appeal and Error—Instructions — Verdict — Judgments — Objections and Exceptions.

Where the plaintiff's right of dower is principally involved in the action, and plenary evidence in her favor tends to establish it, it is unnecessary on her appeal that she should have offered special prayers for instruction on the law involved and an exception to the judgment rendered adversely to her is sufficient to present the question to the Supreme Court.

APPEAL by plaintiff from VANCE Superior Court. *Devin, J.*

The plaintiff married J. J. Horton December 10, 1913. He died in October, 1922. Plaintiff married Rook June 14, 1924.

W. R. Horton, who died July 23, 1924, had only two children, J. J. Horton and W. J. Horton, both children of his first marriage. Mary F. Horton, first wife of W. R. Horton, died March 9, 1912. Julia Mae Horton, second wife of W. R. Horton, is the defendant. This marriage took place June 25, 1913. The property in controversy, a lot of land in Henderson, N. C., was originally the property of W. R. Horton. March 19, 1904, W. R. Horton conveyed by deed, duly registered in Book 15, page 536, this lot to his then wife, Mary F. Horton, for life, with remainder in fee to his son, W. J. Horton, in consideration of natural love and affection, and $800 paid by W. J. Horton. W. J. Horton died January 31, 1905, leaving J. J. Horton his only heir at law. September 1, 1913, W. R. Horton deeded this land to Julia May Horton, for life, and this deed was registered March 1, 1915. July 13, 1917, W. R. Horton executed and delivered to defendant, a deed in fee simple for the land in controversy, which was registered July 17, 1917.

There was evidence tending to show that W. R. Horton lived on this lot of land with his first wife, and lived with his second wife there until his death, and that she now has possession of this lot. Plaintiff seeks dower as the widow of J. J. Horton.

The verdict was as follows:

"1. Is the plaintiff the widow of J. J. Horton deceased and was she living with him at the time of his death? A. Yes, (by consent).

"2. Has the defendant, Mrs. Julia May Horton, been in adverse possession under colorable title of the land described in the petition for 7 years next preceding the institution of this proceeding? A. Yes."

From a judgment thereon in favor of defendant plaintiff appealed.

J. H. Bridgers for plaintiff.

Hicks & Son, Kittrell & Kiltrell, Perry & Kittrell and Thomas M. Pittman for defendant.

VARSER, J. Plaintiff's exceptions challenge the rulings of the trial court in holding that adverse possession under color of title for a period of seven years was sufficient to bar the petitioner's right of dower. The other exceptions in the record are either immaterial or necessarily abide the result of this one question.

In questions relating to dower the widow is not to be considered a creditor or purchaser for value. *Pridgen v. Pridgen, ante,* 102; *Haire v. Haire,* 141 N. C., 88; *Norwood v. Marrow,* 20 N. C., 578. Marriage constitutes a valuable consideration for many purposes, but not with respect to dower. Dower arises not from the contract of marriage, but from the law, on account of marriage. Husband and wife make no contract with respect to dower or curtesy. Frequently dower is allotted in spite of the husband's previous acts or declarations. *Pinner v. Pinner,* 44 N. C., 475.

Defendant relies on adverse possession under two deeds from W. R. Horton to her. The first deed attempts to convey a life estate and the second deed attempts to convey the fee in the lands in controversy. The first deed is dated prior to the marriage of petitioner with J. J. Horton, who was, at that time, admittedly the owner of the fee in the lands in controversy, but this deed was registered after petitioner's marriage. It appears that the defendant is not, under these deeds, a purchaser for value, but that both of these deeds, as recited by the court in its charge, were deeds of gift. The deed executed by W. R. Horton, to his first wife for life and then to W. J. Horton, did constitute W. J. Horton a purchaser for value, for this deed recites a consideration of $800 paid by W. J. Horton. This is an admission by W. R. Horton, the common source. The deeds from W. R. Horton to the defendant, could not constitute, in any event, as against J. J. Horton, color of title until registered. *Austin v. Staten,* 126 N. C., 783; *Collins v. Davis,* 132 N. C., 106.

The defendant relies upon *Kluttz v. Kluttz*, 172 N. C., 623 and *King v. McRackan*, 168 N. C., 624. *King v. McRackan, supra*, establishes the rule under which W. J. Horton becomes a purchaser for value under the admission of W. R. Horton the common source, and *Kluttz v. Kluttz, supra*, follows *Collins v. Davis, supra*, limiting the rule that unregistered deeds are not color of title to purchasers for value. It is by virtue of this rule that defendant's deeds from W. R. Horton are not color of title in favor of a disseizor, when the disseizor is claiming under the common source.

Dower is only an elongation of the husband's estate. *Graves v. Causey*, 170 N. C., 175, 177; *Everett v. Newton*, 118 N. C., 921; *Malloy v. Bruden*, 86 N. C., 258; *Williams v. Bennett*, 26 N. C., 122; *Norwood v. Marrow, supra;* but when it becomes inchoate it cannot be barred, except as provided by law.

J. J. Horton died in 1922, and this action was instituted in 1924. In no view of the defendant's evidence, viewed in its most favorable light for her, did she and her husband, W. R. Horton, have seven years adverse possession under color, unless it took place, for the most part, during petitioner's coverture. Defendant asserts that, under the rule announced in *Brown v. Morisey*, 124 N. C., 296, adverse possession during the coverture will bar dower. The first vital difference between *Brown v. Morisey, supra*, and the instant case, is that in *Brown v. Morisey*, both the marriage and the acquisition of the land were prior to 1856. Then our dower statute allowed the widow to claim dower in the lands "of which her husband died seized or possessed," and, *now* she may seek dower in the lands of which he was beneficially seized at any time during the coverture. However, in *Brown v. Morisey, supra*, there were two dissents and one concurring opinion. *Brown v. Morisey*, 126 N. C., 772 (the same case reheard) held, reversing the former opinion, that adverse possession, while the dower was inchoate, could not constitute a bar. In *Campbell v. Murphy*, 55 N. C., 360, *Chief Justice Pearson* states the limitations as to the exercise of the writ of right and writ of dower at common law. It further appears that *Brown v. Morisey, supra*, has remained an unquestioned authority for twenty-five years.

On account of the nature of the wife's interest in an inchoate right of dower, she cannot set up her claim to dower during her husband's lifetime. *Hughes v. Merritt*, 67 N. C., 386; *Felton v. Elliott*, 66 N. C., 195; *O'Kelly v. Williams*, 84 N. C., 283; *Gatewood v. Tomlinson*, 113 N. C., 312; *Rodman v. Robinson*, 134 N. C., 503. This rule does not affect her rights in equity for the protection of her inchoate right, as discussed in *Deans v. Pate*, 114 N. C., 194; *Gore v. Townsend*, 105 N. C., 228, and cases therein cited.

Since the wife may not maintain an action for dower prior to the husband's death, she is not put to her right of action against a disseizor during the coverture; and, therefore, adverse possession by a disseizor with or without color of title, after her marriage, does not bar or affect her right to dower. This rule is recognized practically wherever the widow is dowable as at common law, and as now provided by statute in this State. The reason, upon which seizin in law is as effectual to support dower as seizin in deed, is as stated by Blackstone: "For it is not in the wife's power to bring her husband's title to actual seizin." 2 Blackstone, 131; Lewis' Edition, 594. This reason applies with equal force in adverse possession during coverture where she has no right to the possession during the husband's lifetime, and, therefore, could not compel her husband to sue, and she is without power to sue in her own right. 19 C. J., 500; Tiffany on Real Property, 821; *Miller v. Pence,* 132 Ill., 149; *Lucas v. Whitacre,* 121 Iowa, 251; *Williams v. Williams,* 89 Ky., 381; *Moore v. Frost,* 3 N. H., 126; *Durham v. Angier,* 20 Maine, 242; *Culler v. Motzer,* 28 Pa., 256 (Sergeant Rawle's Reports, 356); 9 R. C. L., 385, 612; *Lucas v. White,* 85 N. W., 209.

The ordinary statutes of limitations do not, unless expressly so provided, apply to dower. Neither does the seven-year statute which makes title with color an adverse possession. Her right, while inchoate, does not repel the use and enjoyment by others; she is not repelled by the statute of limitations. *Spencer v. Weston,* 18 N. C., 213; *Campbell v. Murphy, supra; Simonton v. Houston,* 78 N. C., 408.

Dower is a favorite of the law (*Pridgen v. Pridgen, supra*), and the courts will not be astute to find ways by which it will be barred. Feudal regulations put every safeguard around the alienation of land, and so complex did it become that it worked its own overthrow. The next and modern effort was to facilitate the transfer of title to land; but, as reasoned by *Chief Justice Taylor* in *Frost v. Etheridge,* 12 N. C., at page 38, that "a very helpless part of the community has sacrificed in an undue proportion towards its establishment; and, therefore, 'the pittance,' the dower, has been protected from reasonings and analogies that might otherwise work its destruction."

When once vested in her, the wife's inchoate dower right will be protected. *O'Kelly v. Williams, supra.*

The defendant challenges plaintiff's right to raise these questions on account of failure to ask special instructions in writing, under *McKinnon v. Morrison,* 104 N. C., 363. We do not think this salutary rule will bar plaintiff. The admission of the falling in of the life estate in 1912; the admitted marriage of petitioner in 1913, and the dates of the registration of the two deeds from W. R. Horton, to wit, 1915 and 1917, and the second issue, are sufficient to permit this question to

be raised under the exception to the judgment. The judgment is not supported by the verdict when the above facts are considered. The appeal, itself, is sufficient to raise this question. *Williamson v. Rabon*, 177 N. C., 302; *Ullery v. Guthrie*, 148 N. C., 417; *Griffith v. Richmond*, 126 N. C., 377; *Thornton v. Brady*, 100 N. C., 38.

The plaintiff contends that the possession of the father, W. R. Horton, was not adverse to J. J. Horton, but we do not find it necessary to decide that interesting question, in the light of our views on the effect of such possession upon plaintiff's dower right. The trial court held, and we think properly so, that the deed by W. R. Horton to Mrs. Mary F. Horton and W. J. Horton, dated 19 March, 1904, conveyed a life estate in the lands in controversy to Mary F. Horton, and the remainder in fee to W. J. Horton. Upon W. J. Horton's death in 1905, this remainder descended to J. J. Horton. Upon the falling in of the life estate of Mary F. Horton in 1912, J. J. Horton became the owner of the fee and entitled to the possession.

When plaintiff's coverture began in December, 1913, her husband J. J. Horton was still the owner and beneficially seized of the lands in controversy. It was error to hold that seven years adverse possession under color of title, accruing since the coverture began, was a bar to plaintiff's claim of dower. Therefore, there must be a

New trial.

N. W. POWERS v. MRS. MATTIE JONES.

(Filed 30 September, 1925.)

Contracts—Breach—Damages—Conditional Acceptance.

Where one assuming to act as agent for another writes that he has a person who will take the property at a certain price, and the owner says she will sell at that price and asks that the proposed unnamed purchaser be referred to her for the consummation of the deal, the owner makes no unconditional acceptance of the offer, and no action for damages can be maintained against her for breach of contract of sale.

VARSER, J., concurs in the result only.

APPEAL by plaintiff from *Cranmer, J.*, at April Term, 1925, of CURRITUCK. Affirmed.

Action to recover damages for breach of contract to convey land. Defendant, in her answer, denied that she had made a contract to sell and convey her land to plaintiff, as alleged in the complaint. At close of plaintiff's evidence, on motion of defendant, judgment of nonsuit was rendered. From this judgment, plaintiff appealed.

Aydlett & Simpson for plaintiff.
Thompson & Wilson for defendant.

CONNOR, J. Evidence offered by plaintiff tended to show the following facts:

On 25 July, 1919, defendant, Mrs. Mattie Jones, was indebted to J. Q. A. Wood, in the sum of $1,500. This indebtedness was secured by a mortgage on the Benton Farm, in Currituck County, owned by defendant. The indebtedness was past due. On said date, Mr. Wood wrote Mrs. Jones that "he had just seen a man who would give her $2,200, cash, for her Benton Farm." He requested her to let him know if she would sell her farm to this man for this sum. He further stated in his letter that he would be compelled to collect his money from defendant by 1 October. He concluded his letter to defendant by expressing the hope that she would sell her land, herself, and thus get something out of it for herself.

On 28 July, 1919, Mrs. Jones, in reply to this letter, wrote Mr. Wood, that as he needed his money, and as she had no means of paying him, except by the sale of the land, she would take $2,200 for it. She directed Mr. Wood to "refer the party to her, as she wished to settle the matter at once." On 30 July, 1919, Mr. Wood acknowledged receipt of this letter, advising Mrs. Jones that he would let her know when *Mr. Poyner* was ready to pay for the land. Again on 13 August 1919, Mr. Wood wrote Mrs. Jones, advising her that *Mr. N. W. Poyner* "who wants to buy your land is here and wishes you and Mr. Jones to come here at once and make him a deed." There was evidence that Mr. Wood confused the name of Mr. N. W. Poyner with that of Mr. N. W. Powers, the plaintiff, and that the plaintiff was the man to whom Mr. Wood referred in his letter to Mrs. Jones, dated 25 July, 1919. There was no evidence however, that he ever informed her of his error.

There was no evidence that Mr. Wood at any time after the receipt of defendant's letter, dated 28 July, 1919, referred plaintiff to Mrs. Jones, as she requested, or informed her by letter or otherwise that plaintiff was the man who was willing to give her $2,200 for her land. Nor was there any evidence that plaintiff communicated, in person or otherwise with Mrs. Jones, relative to the purchase of the land, although Mr. Wood wrote him on 30 July, 1919, that Mrs. Jones was willing to take $2,200 for the land, and although plaintiff on 11 August, 1919, left with Mr. Wood, for Mrs. Jones, his check for $700 to pay the difference between the proposed purchase price and the amount of her indebtedness to Mr. Wood. There was no evidence that Mr. Wood ever tendered to Mrs. Jones on behalf of plaintiff, this check or any sum for her land.

Mrs. Jones subsequently sold her land to another person, and out of the proceeds of the sale paid her indebtedness to Mr. Wood. On 18 September, 1922 plaintiff brought this action against Mrs. Jones, alleging "that in July, 1919, he contracted in writing to purchase of defendant her Benton Farm for $2,200, and that he had been damaged in the sum of $1,300 by her failure to comply with her contract." These allegations were denied by defendant, in her answer.

If it be conceded that Mr. Wood wrote the letter to Mrs. Jones, dated 25 July, 1919, as agent of plaintiff, and that this letter was an offer by plaintiff to purchase of Mrs. Jones her Benton Farm, for $2,200, with the request that she let Mr. Wood know if she was willing to sell the land to plaintiff for that sum, then her letter to Mr. Wood, dated 28 July, 1919, was not an acceptance of this offer. She expressed her willingness, it is true, to sell the land for the sum proposed, but requested that the proposed purchaser be referred to her, in order that she might herself close the matter. This was not such an acceptance of an offer, as constitutes a contract. She expressly reserved the right to accept or reject the "man whom Mr. Wood had just seen," and whose name he had not disclosed to her, as the purchaser of her land.

The letters offered in evidence, as a contract in writing, binding on defendant, to sell and convey her land to plaintiff, do not constitute a final contract between plaintiff and defendant. Her letter to Mr. Wood is evidence of a willingness on her part to enter into negotiations with the proposed purchaser, when he had been referred to her by Mr. Wood. It was not an acceptance by her of Mr. Wood's undisclosed principal as the purchaser of her land.

The evidence offered by plaintiff is not sufficient to establish the truth of his allegation that defendant had in July, 1919, contracted in writing to convey to him her Benton Farm for $2,200. There was no error in rendering judgment of nonsuit. The judgment is

Affirmed.

VARSER, J., concurs in the result only.

H. CHESSON ET AL. V. THE WASHINGTON COUNTY BANK ET AL.

(Filed 30 September, 1925.)

1. Evidence—Discovery—Pleadings—Statutes.

To obtain an order for the examination of defendant to discover necessary information to file his complaint under the provisions of C. S., 900 *et seq.*, it is necessary for the plaintiff to show under oath that in good faith the information sought is not otherwise available to him, and its

necessity in such detail as will enable the court to pass thereon, and when an appeal from the refusal of the order, this has not been done, the decision of the lower court will not be disturbed.

2. Appeal and Error—Record—Case on Appeal—Variance.

Where the record does not state the truth in regard to an appeal, the appellant should move the trial court to have it corrected, and where there is a variance between the record proper and the case on appeal as to an exception claimed to have been taken, the former will control.

APPEAL by defendants from *Cranmer, J.,* at Chambers in Tarboro, 1 April, 1925. From WASHINGTON.

Civil action pending in the Superior Court of Washington County.

The plaintiffs, desiring to elicit certain information upon which to draft their complaint, notified the defendants that they would move before the judge of the Superior Court, holding the courts of the Second Judicial District, at Tarboro on 1 April, 1925, for an order directing the defendants to appear before a commissioner and submit themselves to examination at the hands of the plaintiffs for the purpose of giving the plaintiffs an opportunity to procure information to frame their complaint. Upon this notice and application, the judge granted the motion, except as to the Branch Banking & Trust Company, receiver of the United Commercial Bank, to which order the other defendants then and there excepted, noted their exception of record, and from which order they subsequently appealed.

W. L. Whitley for plaintiffs.

P. W. McMullan, Zeb. Vance Norman and Ward & Grimes for defendants.

STACY, C. J. The order of examination, from which the defendants appeal, was entered on motion in the cause, made by plaintiffs under authority of C. S., 900 *et seq.,* to procure information for the drafting of their complaint.

According to the decisions, dealing directly with the subject, it has been held that, after the commencement of an action, a preliminary examination of the defendant may be had by the plaintiff, (1) before filing complaint, if it be made to appear that such is necessary to enable the plaintiff to draft his complaint (*Holt v. Warehouse Co.,* 116 N. C., 480); and (2) after pleadings have been filed, the plaintiff may cause the defendant to be examined, to the end that he may procure evidence for the trial. *Vann v. Lawrence,* 111 N. C., 32.

Likewise, the defendant may have the plaintiff examined (1) before filing answer, if it be made to appear that such is necessary to enable the defendant to draft his answer, especially if an affirmative defense

or counterclaim is to be set up; and (2) after pleadings have been filed, the defendant may cause the plaintiff to be examined, to the end that he may procure evidence for the trial. *Jones v. Guano Co.*, 180 N. C., 319.

Speaking to the second or latter right, as affecting both parties, *Avery, J.*, in *Helms v. Green*, 105 N. C., p. 262, said: "When the pleadings are complete, other material facts may be elicited from an adversary by examination in support of the main action or the cross-action set up in the counterclaim, if the disclosures by way of admissions are not deemed sufficiently full. A party who puts his adversary on the stand gives him an opportunity to testify in his own behalf on cross-examination, and waives his right of impeaching him by attacking his credibility, but retains the privilege of contradicting him by testimony of other witnesses inconsistent with his."

But in the instant case, plaintiffs are seeking to elicit, by examination of the defendants, information to enable them to draft their complaint. No affidavit appears in the record on which the motion for order of examination was made, and it is the approved position with us that such a motion should be based upon an affidavit stating the facts which entitle the plaintiffs to the order. Speaking directly to the question in *Bailey v. Matthews*, 156 N. C., p. 81, *Walker, J.*, said:

"In a proceeding of this kind, it is of the first importance that the application for an order of examination should be under oath, stating facts which will show the nature of the cause of action, so that the relevancy of the testimony may be seen and the Court may otherwise act intelligently in the matter, and it should appear in some way, or upon the facts alleged, that it is material and necessary that the examination should be had and that the information desired is not already accessible to the applicant. It should also appear that the motion is made honestly and in good faith and not maliciously—in other words, that it is meritorious. 8 Enc. of Pl. and Pr., p. 41 *et seq.* Surely, a clerk or judge is not bound to grant such an order if it appears to be unnecessary, or if the evidence sought to be elicited is immaterial, or the application appears to be made in bad faith. It is but just and right that the application should be made under the obligation and responsibility of an oath to protect the respondent against false and malicious accusations and vexatious proceedings. The law will not permit a party to spread a dragnet for his adversary in the suit, in order to gather facts upon which he may be sued, nor will it countenance any attempt, under the guise of a fair examination, to harass or oppress his opponent. It is a very rare case that requires the exercise of this function of the court, and the order should not be made without careful consideration and scrutiny."

To like effect are the holdings in *Fields v. Coleman,* 160 N. C., 14; *Jones v. Guano Co.,* 180 N. C., 319, and *Monroe v. Holder,* 182 N. C., 79.

The judge certifies, however, in response to a *certiorari,* issued at the instance of the plaintiffs, that, as he understood the order, it was entered by consent, though he allowed an exception to be noted at the time. This, it will be observed, is at variance with the record as it appears on the minutes of the Superior Court and as certified to this Court. Under such conditions, it is the uniform holding with us that the record proper must govern. *S. v. Wheeler,* 185 N. C., 670; *Moore v. Moore, ibid.,* 332. The judgment is a part of the record proper. *Thornton v. Brady,* 100 N. C., 38. The plaintiffs were remiss in allowing the record to show an excepted order, when it was entered by consent, and they should have lodged a motion before the judge to have the judgment, as recorded, speak the truth. Having neglected to do this, we must dispose of the appeal on the record as it stands below and as certified to this Court. *Bartholomew v. Parrish, ante,* 151.

The order, as we are compelled to deal with it, appears to have been improvidently granted, under the authorities above cited, and it is accordingly

Reversed.

Z. V. SNIPES v. P. E. MONDS, ADMINISTRATOR OF T. L. FITZGERALD, DECEASED.

(Filed 30 September, 1925.)

1. Pleadings—Demurrer—Courts.

Demurrer *ore tenus* may be taken to the sufficiency of the complaint to state a cause of action at any time during the progress of the trial, in the Superior or in the Supreme Court, on appeal, or the Courts may pass upon the question *ex mero motu.*

2. Executors and Administrators—Debts—Personal Liability.

An executor cannot charge the estate of the decedent with obligations arising after his death, incurred in the continuance of a business the decedent had engaged in during his life, such liability being that of the executor personally who has attempted to do so.

APPEAL by plaintiff from HARNETT Superior Court. *Lyon, J.*

Action by plaintiff to recover of the defendant, administrator, *d. b. n., c. t. a.* of T. L. Fitzgerald, deceased, $1,700.10, the value of goods, supplies, gasoline, lubricating oil, tires, casings, fixtures, parts, and work of mechanics in repairing cars, purchased and had by the executors of T. L. Fitzgerald and used by them in collecting the debts due this estate,

as per itemized and verified statement of account filed with the executors, but no payment has been made thereon.

It is further alleged that the executors took over the entire property, estate and business of T. L. Fitzgerald, upon qualification, consisting of large farming interests, and a large livestock and vehicle and harness business in Dunn, N. C., and that they "acted as dealers in mules, horses, buggies, wagons and harness; that under the authority of an order of the clerk of the Superior Court of Harnett County, they borrowed money from banks to carry on said business," and that these executors, who qualified 7 February, 1921, resigned their trust in January, 1923, and that the defendant was appointed then, administrator of T. L. Fitzgerald *d. b. n., c. t. a.* Due demand was made for this account. The defendant demurred for that the complaint did not state a cause of action, in that it appeared that the debt sued on was incurred, after the death of T. L. Fitzgerald, as expenses in the administration of the estate by his executors.

The terms of the will are not germane to this controversy. The court below sustained the demurrer and the plaintiff appealed.

H. L. Godwin for plaintiff.
Clifford & Townsend for defendant.

VARSER, J. Even after answering in the trial court, or in this Court, a defendant may demur *ore tenus,* or the Court may raise the question *ex mero motu* that the complaint does not state a cause of action. *Garrison v. Williams,* 150 N. C., 675. Construing the complaint liberally in favor of the plaintiff (*Horney v. Mills,* 189 N. C., 724, 728), to the end that it must be upheld unless wholly insufficient (*Sexton v. Farrington,* 185 N. C., 339; *Blackmore v. Winders,* 144 N. C., 212; *Bank v. Duffy,* 156 N. C., 83; *Pridgen v. Pridgen, ante,* 102), the demurrer must be sustained.

An executor cannot, by any contract of his, fasten upon the estate of his testator liability created by him, and arising wholly out of matters occurring after the death of the testator. *Banking Co. v. Morehead,* 116 N. C., 410; *McLean v. McLean,* 88 N. C., 394; *Tyson v. Walston,* 83 N. C., 90; *Kerchner v. McRae,* 80 N. C., 219; *Beaty v. Gingles,* 53 N. C., 302; *Hailey v. Wheeler,* 49 N. C., 159; *Devane v. Royal,* 52 N. C., 426. This is true even when the creditor knows that the money loaned is to be used in payment of the debts of the testator (*Banking Co. v. Morehead, supra*), or for attorneys' fees for services rendered the executor in the discharge of his trust. *Lindsay v. Darden,* 124 N. C., 307. Such contracts always support an action by the creditor against the executor personally. When such expenses as sued for in this action, or

fees of counsel, are properly incurred, and paid by the executor, then he may, if the disbursement be proper, be allowed these in his settlement of the estate. The probate court will then determine whether such are reasonable and just, and make such allowances as may be proper.

The debt sued on is not a debt of the estate of T. L. Fitzgerald, and no cause of action is stated in the complaint. *Lindsay v. Darden, supra,* 11 R. C. L., 165; *Banking Company v. Morehead, supra; Whisnant v. Price,* 175 N. C., 611, 613; *Craven v. Munger,* 170 N. C., 424; *Alexander v. Alexander,* 120 N. C., 472; *Kessler v. Hall,* 64 N. C., 60; *Devane v. Royal,* 52 N. C., 426.

It may be well to note that, under chapter 86, Public Laws 1925, executors or administrators may renew the obligations of the decedent without incurring personal liability.

The learned judge below was clearly right, and the judgment appealed from is

Affirmed.

C. B. SITTERSON v. THOMAS SPELLER.

(Filed 30 September, 1925.)

1. Pleadings—Actions—Interveners—Judgments.

An interpleader in an action is not entitled to judgment upon ground that the plaintiff has not answered his interplea, when it appears that the complaint was filed after the interplea containing allegations sufficient to sustain the plaintiff's contention, and in complete denial of the allegations of the interplea.

2. Claim and Delivery—Actions—Interveners—Issues—Burden of Proof.

An interpleader or intervener in claim and delivery has not the same status as one who has regularly become a party plaintiff or defendant therein, and he has the burden of proof upon the single issue involving his independent right to the property in controversy.

APPEAL by W. P. Speller, intervener, form *Devin, J.,* at April Term, 1925, of BERTIE.

Civil action in claim and delivery, tried upon the following issue:

"Is the interpleader, W. P. Speller, entitled to the possession of the property described in his interplea? Answer: No."

From a judgment on the verdict and pleadings in favor of plaintiff, the defendant filing no answer, the intervener appeals, assigning errors.

Craig & Pritchett for plaintiff.

Gillam & Davenport for intervener.

STACY, C. J. This is an action in claim and delivery, instituted by plaintiff, as mortgagee and licnee, to recover of the defendant, Thomas Speller, the possession of certain crops and articles of personal property, described in various mortgages and liens executed by defendant to plaintiff. Judgment by default was entered against the defendant because of his failure to appear or file any answer to plaintiff's complaint. But after the institution of the action and before trial, W. P. Speller was allowed to intervene and set up claim to all the property seized by the sheriff, except two mules which he excluded from his allegation of ownership. Upon the issue thus joined between the plaintiff and the intervener, there was a verdict and judgment in favor of the plaintiff.

The intervener's first exception is to the refusal of the court to grant his motion for judgment on the pleadings, no answer or reply having been filed by the plaintiff to his petition and affidavit in which he claimed title to the property in controversy. The court committed no error in this respect, for it appears from an inspection of the record that the complaint was filed after the intervener's application to be allowed to interplead, and the complaint, so filed, contains a full and complete answer to the allegations set out in intervener's application and affidavit. It is manifest from the pleadings that the controversy arises out of conflicting claims based upon several mortgages and liens executed by the defendant to the plaintiff and the intervener. In this state of the record, it is unnecessary for us to say whether or not the plaintiff, in a claim and delivery proceeding, should formally answer the allegation of ownership made by an interpleader, though such practice has been pursued in a number of cases. *Dawson v. Thigpen*, 137 N. C., 462; C. S., 840, and annotations.

In a claim and delivery proceeding, where an interpleader or intervener is allowed to come in and set up title and right to possession of the property attached or seized, such interpleader or intervener does not, strictly speaking, become a party to the action in the same sense and with the same status as the original parties, or those made so, pending the action, either by the court *ex mero motu* or upon application. *Dawson v. Thigpen, supra.* It is well settled by all the authorities that an interpleader or intervener, in such an action, is entitled to be heard only upon one issue, namely: Does the property seized belong to the interpleader or intervener? *Temple v. LaBerge*, 184 N. C., 252; *Feed Co. v. Feed Co.*, 182 N. C., 690; *Bank v. Furniture Co.*, 120 N. C., 477. In such suit, the interpleader or intervener cannot raise or litigate any other question or right. *Dawson v. Thigpen, supra.*

His Honor correctly charged the jury that upon the issue thus joined, the burden was on the interpleader or intervener to make out his claim and to show title to the property in controversy. *Sterling Mills v.*

Milling Co., 184 N. C., 461; *Mangum v. Grain Co.*, 184 N. C., 181; *Moon v. Milling Co.*, 176 N. C., 410.

A careful perusal of the record leaves us with the impression that the case has been tried substantially in accord with the decisions bearing on the subject, and that the verdict and judgment should be upheld.

No error.

SCOTTON MOTOR COMPANY v. J. L. SCOTTON.

(Filed 30 September, 1925.)

Corporations—Minutes of Meetings—Evidence—Presumptions.

The recorded minutes of a stockholders meeting are presumed to cover their entire subject-matter, but it may be shown by parol evidence that they were fragmentary and incomplete as to material matters in controversy.

APPEAL by plaintiff from *Bond, J.*, at April Term, 1925, of JOHNSTON.

The plaintiff alleges that in a regular meeting of its stockholders it was unanimously resolved that the corporation should increase its capital stock for the purpose of buying a site and building a garage; that the defendant and all the other stockholders subscribed $6,000 to the capital stock to be paid in this way: that each stockholder was to subscribe for sixty shares of stock, of the par value of $100 a share, in the Smithfield Building & Loan Association paying a certain sum each week, for which the Building & Loan Association was to lend the plaintiff $2,500; that all the stockholders, including the defendant, subscribed for said shares, after which the loan of $2,500 was made; that the defendant discontinued his payments to the Building & Loan Association without the plaintiff's knowledge, and liquidated his stock therein, and now refuses to pay any part of his subscription to the capital stock of the plaintiff. The plaintiff alleges that the defendant is due the plaintiff $6,000 with interest from 1 August, 1920.

The defendant filed an answer admitting certain allegations and denying others. He set up an alleged agreement to the effect that since he had been removed from the board of directors he should be released from any obligation on account of his subscription to the Building & Loan Association and should be at liberty to liquidate his stock. He alleged that he had sold his stock in the Association and that the plaintiff was not indebted to it.

At the trial the plaintiff offered in evidence the minutes of a meeting of the stockholders of the plaintiff company held 30 January, 1920: "Stockholders' meeting as of 1 August, 1919. Motion by R. P. Holding

to pay each director one hundred dollars per month. Seconded by W. H. Austin. Motion prevailed. Motion as of 1 January, to pay 4% dividend on capital stock. Motion prevailed. Motion of F. K. Broadhurst for each stockholder to take out 60 shares of Building and Loan. Motion prevailed. Motion by F. K. Broadhurst to appoint trustee to hold stock, R. P. Holding elected trustee. Motion for each stockholder to pay in $500.00. Building committee instructed to put up a temporary building at once. Also to sell the dwelling-house. Motion to adjourn prevails."

The plaintiff offered evidence tending to show that this record is not a full and comprehensive report of the proceedings had on 30 January, 1920; tending to show why each stockholder took shares in the Building & Loan Association and why a trustee was appointed to hold stock; and that the defendant made payments to the association for the benefit of the plaintiff upon the shares allotted him. This evidence was excluded and the plaintiff excepted.

Ed S. Abell and Ed F. Ward for plaintiff.
Parker & Martin and Wellons & Wellons for defendant.

ADAMS, J. The general rule is that the recorded minutes of a corporation are presumed to cover the entire subject-matter or transaction and constitute the best evidence. But if the entire transaction is not recorded or the record is incomplete and fragmentary the presumption is not conclusive and parol evidence may be introduced to show what in fact was done. The incomplete records of private corporations are generally open to explanation by parol evidence. This position is sustained in numerous cases. *Rose v. Ind. Chevra Kadisho,* 64 At. (Pa.), 401; *Produce Co. v. Stephens,* 133 N. W. (Minn.), 93; *S. v. Guertin,* 119 N. W. (Minn.), 43; *Selley v. Am. Lubricator Co.,* 93 N. W. (Ia.), 590; 4 Fletcher Cyc. Cor. 4054; 14 C. J., 376, sec. 494. We think the plaintiff's proposed evidence should have been admitted.

New trial.

THE PITT LUMBER COMPANY v. HIGGS BROTHERS.

(Filed 30 September, 1925.)

1. Evidence—Nonsuit.

In an action upon the promise of another to pay for lumber used in the construction of a dwelling, to the extent of a certain amount loaned to the owner, upon the latter's approving the various accounts which alone the evidence tends to show, a judgment of nonsuit in plaintiff's favor should be allowed when the amount involved exceeds that agreed upon as a loan, and the owner has for that reason refused to approve it.

2. Contracts—Writing—Statute of Fraud—Promise to Pay Debt of Another.

Where the promise to answer for the debt, default or detinue of another is collateral, and merely superadded to that of the original promisor who remains liable therefor, and such promise does not create an original obligation, the second promisor cannot be held answerable on his promise unless reduced to writing, under the requirements of the Statute of Frauds. C. S., 987.

APPEAL by defendants from *Barnhill, J.,* at March Term, 1925, of PITT.

Civil action to recover balance due on lumber furnished for the erection of a building.

From a verdict and judgment in favor of plaintiff, the defendants appeal, assigning errors.

J. C. Lanier for plaintiff.
S. J. Everett for defendants.

STACY, C. J. The facts are these: Higgs Brothers sold a lot in the town of Greenville, N. C., to L. P. Wayne and agreed to advance him a loan of $4,000.00 with which to erect a building thereon, the same to be paid, from time to time, to the laborers and materialmen as bills for labor and materials were presented and approved by Mr. Wayne. With knowledge of this arrangement, the plaintiff furnished the lumber used on the building, and rendered, at different times, three several statements therefor. The first two were approved by Mr. Wayne and paid by Higgs Brothers. The third and last was not approved by Mr. Wayne because his loan from Higgs Brothers had been exhausted, and this suit is to recover from Higgs Brothers the balance due, or the amount of the third bill, on an alleged original promise to pay for whatever lumber was furnished and used in the construction of the building. *Taylor v. Lee,* 187 N. C., 393.

The matter was submitted to the jury, and a verdict rendered in favor of the plaintiff. But we are unable to discover any evidence on the record sufficient to support the verdict. Plaintiff's secretary and treasurer did testify that he went to see the defendants "to have it understood they would be responsible for the lumber, and Mr. Higgs told me the account would be paid when O. K.'d by Mr. Wayne. He said to furnish the stuff on the job and Mr. Wayne would O. K. the bills and he would pay them." This testimony, it will be observed, is not at variance with the defendants' version of the matter. They were to pay the bills, when approved by Mr. Wayne, up to $4,000.00, and this they did. The plaintiff knew how much the defendants had agreed

to advance on the building, and it is nowhere stated in the evidence that they assumed any responsibility in excess of this amount. Mr. Wayne admits his liability for the account, but he declines to approve the bill as against the defendants because his loan from them has been exhausted. The defendants, according to plaintiff's testimony, agreed to pay only such bills as were approved by Mr. Wayne.

Under this view of the evidence, it is not necessary for us to consider whether the alleged agreement of the defendants to pay plaintiff's bills, without regard to limit, even if made, comes within the statute of frauds, requiring it to be reduced to writing and signed in order to render it enforcible. C. S., 987. It has been held in a number of cases that if a promise is collateral and merely superadded to the promise of another to pay a debt, who remains liable therefor, and such promise does not create an original obligation, the statute applies, and the second promisor cannot be held on his promise, unless it be reduced to writing and signed, as required by the statute. *Whitehurst v. Padgett,* 157 N. C., 424, and cases there cited.

The plaintiff is not undertaking to enforce a lien on the building. The time for that has passed. The suit is based upon an alleged original contract, or promise to pay for whatever lumber was furnished and used in the erection of the building.

On the record, we think the defendants' motion for judgment as of nonsuit should have been allowed.

Reversed.

J. W. WHITEHEAD v. CAROLINA TELEPHONE AND TELEGRAPH COMPANY.

(Filed 7 October, 1925.)

Pleadings—Allegations—Demurrer—Negligence—Torts.

Remote inferences will not be drawn from the allegations in the complaint when necessary to sustain the cause of action; and, *Held,* in an action of tort to recover damages of a telephone company allegations that the failure of the telephone operator to make a connection with the city fire department caused damages by fire to plaintiff's house, resulting in a delay of the department to reach the fire in time to extinguish it, are alone insufficient and a demurrer thereto is properly sustained.

APPEAL by plaintiff from an order of *Devin, J.,* 28 August, 1925, sustaining a demurrer to the complaint. From HARNETT.

The plaintiff alleged that the defendant owned and operated a telephone system in the town of Dunn and that he was a subscriber and patron, having in his dwelling a telephone in good working order; that

the defendant represented to the public that service could be had at any time, day or night; that the town had a fire alarm and a well-equipped fire department with apparatus and skilled firemen who were prompt in responding when the alarm was sounded; that the plaintiff owned an 8-room house, situated near his residence, on the roof of which he discovered a small fire about three o'clock in the morning of 12 March, 1925; that he made diligent effort for 15 or 20 minutes to get a response from the central office of the defendant for the purpose of notifying the local fire department and giving the fire alarm, but was unable to get an answer to his call or any communication with the fire department; and that in consequence his 8-room building was destroyed by fire. With respect to the want of due care the material allegations are these: (1) Through the negligence of the defendant the plaintiff was prevented from getting in communication with the central office. (2) By reason of such negligence, as set forth in the complaint, the plaintiff suffered the entire loss of his building. (3) The fire company did not get to the house until thirty or forty minutes after the plaintiff had discovered the fire and if the company had arrived within twenty or twenty-five minutes the house would have been saved. (4) If the defendant had promptly answered the plaintiff's call the alarm would have been given and the fire department could have put out the fire; and that the defendant's negligent failure to keep a competent person at the switchboard and to communicate with the plaintiff was the proximate cause of the loss.

Godwin & Williams for plaintiff.
Don Gilliam, Clifford & Townsend for defendant.

ADAMS, J. The action, it will be noted, is laid in tort and negligence is the imputed wrongful act. It is contended by the defendant that several of the plaintiff's allegations, especially those relating to the proximate cause of the loss, are inferences or conclusions not deducible from the substantive facts and not admitted by the demurrer. It is also insisted that the circumstances alleged were not such as to have admonished the defendant that its omission would probably result in injury to the plaintiff, and moreover that the essential proximate connection between the alleged negligence and the alleged loss is not susceptible of satisfactory proof.

When its sufficiency is challenged by demurrer a complaint will be sustained if its allegations constitute a cause of action, or if facts sufficient for this purpose are logically inferable therefrom under a liberal construction of its terms. But a demurrer, which raises an issue of law, is construed as admitting only relevant facts well pleaded and

relevant inferences of fact readily deducible therefrom and not as admitting conclusions or inferences of law or matters of evidence or of facts controverting those of which the Court must take judicial notice. *Price v. Price,* 188 N. C., 640; *Foy v. Foy, ibid.,* 518; *Sexton v. Farrington,* 185 N. C., 339; *Sandlin v. Wilmington, ibid.,* 257; *Bank v. Bank,* 183 N. C., 463; *Hartsfield v. Bryan,* 177 N. C., 166; *Crane Co. v. L. & T. Co., ibid.,* 346; *Board of Health v. Comrs.,* 173 N. C., 250; *Foy v. Stephens,* 168 N. C., 438.

In *Bank v. Bank,* 183 N. C., 463, it was alleged that the plaintiff had suffered loss through the defendant's negligent failure in issuing checks to use safety paper and certain protective devices and that the defendant's negligence was the proximate cause of the loss. In the opinion of the Court *Mr. Justice Hoke* said that the general averments of negligence and proximate cause imputing liability to the defendant were not sufficient to sustain the action upon a demurrer to the complaint. And in *Chancey v. R. R.,* 174 N. C., 351, the plaintiff alleged that the defendant had overcrowded the car for which he had purchased a ticket and had failed to light it properly and that by reason of the defendant's negligence he had been assaulted and robbed. A demurrer was sustained. Holding that the imputed act of negligence must be the *causa causans* of the injury or loss, *Mr. Justice Walker* said: "The assault is not described with any particularity, so that we can understand how it came about, and seems to be only the pleader's conclusion as to its character, and not a statement of the facts so as to afford us an opportunity to form an opinion as to what caused it." It is an elementary rule of pleading that a demurrer does not admit the pleader's conclusions or inferences and the Court may not be denied the right to judge for itself whether the plaintiff's allegations are sufficient to warrant a submission to the jury of the question of proximate cause. *Accident Co. v. Bates,* 74 Ill., App. Court, 335; *Greeff v. Assurance Society,* 73 A. S. R. (N. Y.), 659; *Dubois v. Hutchison,* 40 Mich., 262. The bare statement, then, that the defendant's negligence was the proximate cause of the plaintiff's loss, unsupported by allegations of sufficient particularity to enable us to discover a causal relation between the negligent act and the loss is not sufficient. It is therefore essential that we ascertain from the complaint whether such causal relation is proximate or too remote to support the action.

In *Penn v. Telegraph Co.,* 159 N. C., 306, it is said that the rule in actions *ex delicto* is that the damages to be recovered must be the natural and proximate consequence of the act complained of; and in several cases it has been held that the proximate cause of an event is the efficient cause, that which is natural or continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the

result would not have occurred. *Goodlander Mill Co. v. Standard Oil Co.*, 63 Fed., 400; *Ward v. R. R.*, 161 N. C., 179; *Hardy v. Lumber Co.*, 160 N. C., 113. True, the primary cause may be the proximate cause of the injury though it operate through successive instruments or agencies, the question being whether there is an unbroken connection between the wrongful act and the injury complained of—a continuous operation. 1 Thompson on Negligence, 2 ed., sec. 52; *R. R. v. Kellogg*, 94 U. S., 469, 24 Law Ed., 256. The celebrated *Squib case* is a fair illustration of this doctrine. The defendant threw a lighted squib into the market house when it was crowded with those who bought and sold. The fiery missile came down on the shed of a vender of gingerbread who, to protect himself, caught it and threw it away. It then fell on the shed of another ginger-bread seller who passed it on in the same way till at last it burst in the plaintiff's face and put out his eye. The plaintiff brought suit against the defendant who was held answerable on the ground that he was presumed to have contemplated all the consequences of his wrongful act. *Scott v. Shepherd*, 2 W. Blackstone, 892. Other illustrated cases are cited by Thompson in sec. 53. This, however, is not the present case. Here no active interposing causes were set in motion by the alleged negligent act of the defendant, the imputed negligence being the defendant's failure to perform a legal duty. No doubt the failure to perform a legal duty may be the proximate cause of an injury; but the causal connection between the negligent act and the injury must in fact and in law be primary or proximate, and free from such contingencies as make it remote and indeterminable. There must be a direct relation between the cause and the effect, between the wrong and the injury. We are therefore confronted with the question whether the defendant might have foreseen that the plaintiff's injury was remote and whether there were intervening contingencies which rendered the result of the negligent act entirely speculative and the proximate cause of the loss impossible of satisfactory proof.

These questions are considered in *Lebanon Telephone Co. v. Lumber Co.*, 131 Ky., 718, 18 Ann. Cas., 1066. There, as here, a demurrer was filed. The facts are almost identical with those in the case at bar. *Mr. Justice Lassing* wrote the opinion from which we quote: "An analysis of the petition shows that it charges that, if a connection had been promptly established between the watchman and the fire department, the man in charge there would have promptly answered his call, and would have promptly sounded the alarm by ringing the fire bell; that the members of the fire department would have heard the fire bell, when rung, and would have promptly answered the call, and would have reached the fire at least thirty minutes sooner than they did, and before it had spread from the boiler house to the main buildings; that after

having reached the fire the fire department would have put it out before it had communicated to the main buildings, and the plaintiff would have suffered comparatively no loss. Each of these five independent links must be forged into a chain in order to connect the negligence of the defendant's operator with plaintiff's loss. It must be presumed that the watchman in the engine house was awake and at his post of duty ready to answer the call immediately upon receipt of the notice of the fire; that he would at once have sounded the alarm by ringing the bell; that upon the ringing of the bell members of the fire department, whether paid or volunteers, would have heard the alarm and promptly responded to the call, and would have reached the scene of the fire before it had spread to the main building. The fire-fighting apparatus must have been in perfect working order, and the fire department must have succeeded in confining the fire to the boiler room, and put it out before it had spread to the other buildings. Now, when it is considered that each of these separate agencies is wholly independent of the other, and none of them under the direction or subject to the control of the defendants, it is readily seen that, in order to hold that the negligence complained of was the proximate cause of the injury or loss, a series of presumptions must be indulged in. . . . We know that fire fighting, under the most favorable circumstances, and with the most approved appliances and modern machinery, is an uncertain and frequently disastrous business. No two fires are alike, and it is indulging in the purest speculation to try to figure what would have been done under other conditions and different circumstances."

The Court concluded that the facts upon which a recovery was sought were entirely too speculative and remote and the petition was dismissed.

Discussing a similar question in *Volquardsen v. Telephone Co.*, 126 N. W. (Ia.), 928, *Mr. Justice Ladd* used this language: "Suppose the connection at the central office had been made promptly, would the fireman in charge of the fire station have responded promptly and promptly have rung the fire bell? Would the members of the department have heard and promptly have repaired to the scene? Was the apparatus for extinguishing the fire in working order and the water supply accessible and sufficient? Would all of these intervening agencies have operated harmoniously and efficiently and with such promptness as to have put out the flames in time to have avoided a total loss? Manifestly these are matters of speculation, and yet all this must be assumed if the loss is to be traced to defendant's negligence. Each of these independent agencies necessarily must be linked together in a line of causation in order to connect it with the loss. None of them were under the direction or control of the telephone company. Moreover, how far the

fire had spread at the time the firemen would have been likely to have reached the scene had the connection been promptly made is left by evidence a matter of speculation merely. And then there are the weather conditions and the character of the material to be taken into account. After the experience of ages, fighting fire, even with modern machinery and apparatus, is precarious business, and uncertain in its results." See, also, *Southwestern Telephone Co. v. Solomon,* 117 S. W. (Tex.), 214; *Evans v. Telephone Co.,* 135 Ky., 66, 135 A. S. R., 444; *Ins. Co. v. Tel. Co.,* 154 N. W. (Ia.), 874. Note 10 A. L. R., 1459.

The complaint proceeds upon the supposition that all the agencies intervening between the negligent act and the destruction of the plaintiff's building would necessarily have worked out with perfect efficiency. This of course is an assumption, or inference, or conclusion which, under the authorities we have cited, the demurrer does not admit.

In support of his contention the plaintiff cites *Hodges v. R. R.,* 179 N. C., 566, in which the demurrer was overruled. A careful perusal of the complaint and of the opinion will disclose material differences between that case and this. There it appeared that the telephone line extended from Tuckerdale to the offices of two physicians whose services had previously been engaged and who were expected when called to go to the plaintiff's house to administer to his wife at the birth of a child; that the plaintiff had made repeated attempts to get in communication with the physicians and had failed because the defendant in breach of a statute had wilfully cut the wire; and that the physicians would have responded had they been called. There was an allegation in the complaint that if the wire had not been cut the physicians could have arrived in time to have saved the patient's life. The defendant demurred on the ground that the damages were remote and that the defendant's negligence was not the proximate cause of the death.

That case and this may be differentiated. There, it may be assumed, the defendant had in mind the probable result of its wilful act. Also, a definite contract had been made with the physicians; and plaintiff's allegation that if the wire had not been cut the patient's life might have been saved was treated in the opinion as broad enough to admit proof that as a matter of science or human experience the physician could have administered remedies which, in all reasonable probability, would have prevented death. None of these elements appears in the case before us.

The judgment is

Affirmed.

SAVANNAH SUGAR REFINING CORPORATION v. MRS. LILLIAN L. SANDERS, W. RANSOM SANDERS, AND W. M. SANDERS, JR., EXECUTORS OF W. M. SANDERS, DECEASED.

(Filed 7 October, 1925.)

1. Contracts—Breach—Bargain and Sale—Damages.

Where a circular letter quoting the price of a commodity for future delivery is sent by a commission man of the seller to a customer, and later the customer writes that he has mislaid the circular letter and substantially states the quoted price and the terms of delivery, etc., asking if the offer was then in force, and being informed that it was, accordingly orders the goods, the minds of the parties come together upon an agreement binding upon both, and the principal, upon the purchaser's refusal of performance, may recover from him the damages he has thereby sustained.

2. Same—Compromise and Settlement—Intent.

Where there are two separate and distinct contracts of sale and purchase, and the purchaser sends his check in full payment of the balance due on the one, the acceptance of the check will not be regarded as a compromise and settlement of both contracts, and where the evidence is conflicting as to the intent of the parties, the question is for the jury.

APPEAL from *Bond, J.*, and a jury, April Term, 1925, of JOHNSTON.

This action was originally instituted against W. M. Sanders, who has since died, and the executors of his estate have been duly made parties defendant.

Plaintiff, through its broker, Lamborn & Co., of Savannah, Ga., claims that it sold W. M. Sanders 50 bbls. of granulated sugar at 22½c per pound, to be delivered in the fall of 1920 between 15 October and 30 November. This action is to recover $2,588.22 for damages for breach of contract.

The defendants denied the contract, set up fraud and also plead accord and satisfaction.

From Savannah, Ga., on 7 July, 1920, Lamborn & Co., who W. M. Sanders had been dealing with before, sent a circular letter to Sanders, in which was stated:

"To the Trade: Subject to confirmation we offer for the account of the Savannah Sugar Refinery their standard fine granulated sugar on the basis of 22.50 less 2% for cash f. o. b. Savannah Refinery, Port Wentworth, Ga., for shipment at seller's option between 15 October and 30 November, 1920. Usual refiner's terms will govern and sales will be covered by contracts signed by buyer and seller as a protection to each. . . . Then is set forth the market conditions and language calculated to induce the defendant and the trade to buy.

On these latter statements defendants set up false and fraudulent representations, etc. But this is not now material, as the issue of fraud

was found in favor of plaintiff, and there is no exception to the charge of the court below on this issue.

Then the circular states in what bulk the sugar can be shipped, but at the seller's option.

On 12 July, W. M. Sanders, writing from Smithfield, N. C., after mentioning a contract then being filled, heretofore made, says: "Is your circular letter of the 7th still in force? I seemed to have overlooked your circular or it came only yesterday." Lamborn & Co., on 15 July, 1920, answers the letter in regard to the contract then in existence—this was a 26c contract, 100 bbls.—and then writes: "Relative to our circular letter of 6 (7) July, we are pleased to advise you that this circular is still in force but unless you act quickly the possibilities are that we will not be able to confirm any of these sugars, therefore, we urge that if you are interested that you wire us immediately upon receipt of this letter giving us a definite order."

On 20 July, 1920, writing from Smithfield, N. C., in answer to Lamborn & Co.'s letter, W. M. Sanders says: "Yours of 15th. I have misplaced the circular letter of 6 (7) July, but it is my recollection that you proposed to make shipment during the fall months, and the price was around 22½ cents. If my memory is correct, you may bill me with 50 barrels."

There was a telegram, dated 2 August, 1920, which it was contended by defendants was never received, and plaintiff never proved by competent evidence that it was sent, viz.: "Bought fifty barrels fine granulated sugar basis twenty-two one-half less two per cent f. o. b. Savannah Refinery shipment sellers option between 15 October and 30 November." This telegram is immaterial from the view we take of the case. There are numerous letters on part of Lamborn & Co., holding Sanders to what they claim is the contract, and a contract sent Sanders for signature which was never signed although in the possession of Sanders; this contract is known as 423 and is in substance what is set forth in the circular letter, but in contract form between the parties.

On 23 August, 1920, W. M. Sanders wrote Lamborn & Co.: "Would you advise me to close out my contract sugar, in haste and with loss?" On 25 August, 1920, Lamborn & Co., answers and says: "It would be our suggestion that you meet reasonable competition. The situation is not in a very happy condition at the present. . . . On 27 August, 1920, W. M. Sanders writes Lamborn & Co.: "Yours of the 27th, also your telegram of the 26th. Our tobacco market opens here on the 7th. If the sugar should arrive before 15 September, I do not believe that it would be convenient for me to pay the draft. This refers to order 1254. Suppose you let the 34 barrels come out around 10 September. In re to contract No. 423, I have no record of having made such a purchase."

On 8 September, 1920, Lamborn & Co., writes Sanders in regard to contract 1254, and then says: "Relative to contract 423 that you mention in your letter of the 27th as having no record of being a party to, we wish to call your attention to the fact that this contract is between your good selves and the Savannah Sugar Refinery, being your purchase of 50 bbls. at 22½c per pound, less 2% for cash f. o. b. Savannah Refinery—for shipment during October-November. Your definite order for these sugars was received in your letter of 20 July."

On 11 September, 1920, Sanders writes to Lamborn & Co., about 1254 contract and says: "In regard to sale 423, I have no record of having made such a purchase, neither did you submit a contract until 11 August. In the meantime I had made another purchase of sugar. I am sorry but I cannot absorb that lot."

Then, on 27 September, 1920, Lamborn & Co., writes Sanders: referring to letter of 20 July, etc. Then on 29 September, 1920, Sanders writes Lamborn & Co., as follows: "I have your letter and telegram of yesterday. I cannot possibly absorb any more sugar now. The conditions here are distressing and I could not pay for the sugar if ordered."

On 8 October, 1920, Sanders writes Lamborn & Co.: "Yours of the 6th. I will send check for shipment in next few days. Please make no further shipments. The decline in prices of cotton and tobacco has hit this section hard. I think everyone should be willing to share in the heavy losses."

The other letters we do not think material. After notice to Sanders, the sugar was sold at a loss of $2,588.22, as of 23 December, 1920.

The defendants, to substantiate the plea of accord and satisfaction, introduced in evidence the following check:

"Smithfield, N. C., 16 Dec., 1920.

"Pay to the order of

Savannah Sugar Refinery Co. $774.48

Seven Hundred and Seventy-four and.....48/100 Dollars.

For a/c and contracts in full to date.

W. M. SANDERS.

"To the Citizens National Bank,
Smithfield, N. C."

The check was duly endorsed by the treasurer of the Savannah Sugar Refining Corporation and was paid. The entire record evidence shows that W. M. Sanders owed Lamborn & Co. on contract 1254, the balance being the exact amount of the check sent.

It was in evidence, on the part of the plaintiff: "That in the summer of 1920, Lamborn & Co., had a toll contract with the Savannah Sugar Refining Corporation, by which the Savannah Sugar Refining Corpora-

tion got a toll on all raw sugars. That Lamborn & Co. sold 100 barrels of sugar to W. M. Sanders at Smithfield, and as the sugar was shipped out, it was delivered by the Savannah Sugar Refining Corporation, because on the toll contract, it was understood and agreed that the Savannah Sugar Refining Corporation would use its facilities for collecting for shipments which it made for Lamborn & Co. A rubber stamp was put on each invoice which Mr. Sanders got and on each invoice which he received it was stated: "Please make your remittances to the Savannah Sugar Refinery." Therefore, he would make the check payable to the Savannah Sugar Refining Corporation instead of Lamborn & Co. The invoice showed the number of the contract that the sugar was intended to cover. Sugar shipped under contract No. 1254 would be stamped on that contract No. 1254, so that the purchaser knew exactly what he was paying for when he remitted."

The issues submitted to the jury and their answers thereto, were as follows:

"1. Did the plaintiff agree to sell to defendant, and did defendant agree to buy of plaintiff, fifty (50) barrels of fine granulated sugar, at the price of twenty-two and one-half (22½) cents per pound, less 2% on board cars at the Savannah Refinery, Port Wentworth, Ga., shipment to be made between 15 October, 1920, and 30 November, 1920, at the option of plaintiff, as alleged in the complaint? Answer: Yes.

2. Was the contract of sale, if made, induced by fraudulent representations of the plaintiff, as alleged by the defendant? Answer: No.

3. Did the defendant wrongfully refuse to accept and pay for the sugar, as he had contracted and agreed to do? Answer: Yes.

4. Has there been a settlement between plaintiff and defendant, as alleged in the answer? Answer: No.

5. In what amount is defendant indebted to the plaintiff? Answer: $2,588.22, with interest from 23 December, 1920."

Judgment was rendered on the verdict. Exception and assignment of error were made and appeal to Supreme Court. Defendants made numerous exceptions and assignments of error to the admission of testimony and charge of the court. The refusal of the court to allow the defendants a judgment as of nonsuit at the close of plaintiff's evidence and at the close of all the evidence.

The entire charge is not set forth in the record. The necessary extracts will be set forth in the opinion.

Connor & Hill; Hitch, Denmark & Lovett of Savannah, Ga., for plaintiff.

Parker & Martin, and Murray Allen, for defendants.

CLARKSON, J. From a careful examination of the entire record we do not see any difficulty in determining that plaintiff and defendant, W. M. Sanders, came to an understanding and agreement. The circular letter from Lamborn & Co., of 7 July, 1920—"We offer for the account of the Savannah Sugar Refinery their standard fine granulated sugar on the basis of 22.50 less 2% for cash." . . . W. M. Sanders' letter of 12 July: "Is your circular letter of the 7th still in force?" Lamborn & Co.'s letter of 15 July: "Circular letter of 6 July (7th) . . . is still in force." W. M. Sanders' letter of 20 July: "The price was around 22½ cents if my memory is correct, you may bill me with 50 bbls."

In *Overall Co. v. Holmes,* 186 N. C., p. 431, this definition of contract is given: "A contract is an 'agreement, upon sufficient consideration, to do or not to do a particular thing.' 2 Blackstone Com. p. 442. There is no contract unless the parties assent to the same thing in the same sense. A contract is the agreement of two minds—the coming together of two minds on a thing done or to be done. 'A contract, express or implied, executed or executory, results from the concurrence of the minds of two or more persons, and its legal consequences are not dependent upon the impressions or understandings of one alone of the parties to it. It is not what either thinks, but what both agree,'" citing numerous authorities.

In the briefs of defendants, great stress is laid on two propositions: (1) That the telegram of 2 August, 1920, was improperly admitted in evidence and that the telegram was the acceptance of a proposition and being a part of the contract relied on was not properly proved. As stated, we think the contract was binding on the parties from the letter of 20 July. The offer was made and accepted: "You may bill me with 50 bbls." Plaintiff from the letter of 20 July, was bound to Sanders and the telegram of 2 August, 1920, did not affect the contract. It was immaterial and not prejudicial and this interesting contention need not now be considered. (2) Conceding that the telegram was properly admitted in evidence and it was an acceptance, plaintiff having waited some 11 days, allowing time for transmission, in this kind of commercial transaction the delay was unreasonable. Defendants in their brief say: "Thus for the period of eleven days before the date of the telegram and twenty-two days before receipt of the formal contract, the defendant, Sanders, was 'hog-tied,' and Lamborn and Company 'foot-loose.'" Whatever may be the merit of defendant's legal contention as to reasonable time, the principle does not apply here. The telegram was not a part of the contract—it was corroborative of it, both were "contract-tied." The contract was concluded by the letter of 20 July. It was so considered by plaintiff, who frequently wrote defendant to

that effect, and the denials of Sanders were negative. In fact, Sanders was careful in his letters, it seems, not to make any positive denial.

The question of what is "reasonable time" is not germane here. What is reasonable time in commercial matters of this kind is ably discussed by *Varser, J.*, in *Colt & Co. v. Kimball, ante,* 169.

We do not think the check sent, on which was written "For a/c and contracts in full to date," was accord and satisfaction on this contract—No. 423. The court below charged the jury, in part, as follows, on this aspect: "If a man be indebted to another, on account, and because of two or more separate and distinct contracts and statement is sent him by the other showing a balance due by him on one of the contracts, and nothing is said or shown in the statement or in the letter accompanying it, as to and in regard to any amount due on the other contract, the sending of a check which has written in the face of it, 'In full of account to date,' or similar language, for the amount shown to be due by the statement, will only be a payment of the amount shown to to be due by the statement, and its acceptance will not operate as a discharge or payment of any amount which may be due on the other contract or contracts, especially if at the time the statement is sent, or check is received, the amount due on the other contract has not been fixed or determined and is not known to either of the parties."

The court below charged further and left it to the jury to find whether, under all the facts and circumstances, Sanders intended the check to be in settlement not only of contract 1254, but the contract involved in this action. The check sent, $774.48, was the exact balance of account on contract 1254. Nothing was said about contract 423. In fact, this contract is now being contested on the ground there was no "coming together of two minds." How could Sanders intend that the $774.48 check was to pay a contract that it is contended he never made? This matter was left to the jury. We think the charge borne out by the decision of this Court.

In *Rosser v. Bynum,* 168 N. C., p. 340, it is said: "It is well recognized that when, in case of a disputed account between parties, a check is given and received clearly purporting to be in full, or when such a check is given and from the facts and circumstances it clearly appears that it is to be received in full of all indebtedness of a given character or all indebtedness to date, the courts will allow to such a payment the effect contended for. The position is very well stated in *Aydlett v. Brown,* 153 N. C., 334, as follows: 'That when a creditor receives and collects a check sent by his debtor on condition that it shall be in full for a disputed account, he may not thereafter repudiate the conditions annexed to the acceptance'; and is upheld and approved in numerous decision of the Court, *Armstrong v. Lonon,* 149 N. C., 435; *Kerr v.*

Sanders, 122 N. C., 635; *Pruden v. R. R.*, 121 N. C., 511; *Petit v. Woodlief*, 115 N. C., 125; *Koonce v. Russell*, 103 N. C., 179. A proper consideration of these and other cases on the subject will disclose that such a settlement is referred to the principles of accord and satisfaction, and unless the language and the effect of it is clear and explicit it is usually a question of intent, to be determined by the jury." *Supply Co. v. Watt*, 181 N. C., 432; *Blanchard v. Peanut Co.*, 182 N. C., p. 20; *DeLoache v. DeLoache*, 189 N. C., 394.

W. M. Sanders is dead and his executors have contested this matter. This was their bounden duty to do, to protect the estate. If he had lived, no doubt this litigation could have been avoided. The contract was made during, perhaps, the worst deflated period this country has known. We must abide by the written words.

In *May v. Menzies*, 186 N. C., p. 149, it is said: "Merchants, in trading with each other, should know their rights and responsibilities. Settled law often has the effect of making people certain and careful in their dealings. Honesty in dealing with each other at home, with those of other States, and with the nations of the earth, is the golden cord to bind us together. Good faith—keeping of contracts."

From a careful review of the entire case, we can find

No error.

C. D. MORGAN v. THE CITIZENS BANK OF SPRING HOPE.

(Filed 7 October, 1925.)

1. Bailment—Banks and Banking—Safety Deposit Boxes.

Where a bank rents safety deposit boxes in its vault to its customers, giving each a key thereto, retaining the master key necessary for the customer to get at the contents of his box, the latter retains title to the contents of the box, and the relation of bailor and bailee is established, in the absence of a special contract to that effect.

2. Same—Negligence—Damages.

The responsibility of bailee rests upon the exercise of his ordinary care to keep the goods in his possession, upon the terms of the bailment, and the liability of insurer does not therein exist.

3. Same—Special Contract.

Where a bank takes out burglar insurance on the contents of safety deposit boxes in its vault, it is not alone evidence of a special contract that will make the bank liable as an insurer of the contents of the safety deposit box rented by it to its customer.

4. Same—Evidence—Burden of Proof—Nonsuit—Pleadings.

In order to recover from a bank for the loss by burglary of the contents of a safety deposit box rented in its vault, etc., it is required of the renter of the box to allege and prove negligence therein on the part of the bank, and where the evidence tends only to show that the bank had used due care in maintaining a vault as generally was considered sufficient in the locality, and the fact of loss by burglary, a motion for judgment as of nonsuit is properly granted.

5. Evidence—Prima Facie Case—Issues—Burden of Proof—Questions for Jury.

Where the evidence is sufficient to make out a prima facie case of negligence on the part of the defendant bailee of goods, the burden of proof of the issue remains with the plaintiff, the prima facie case being only sufficient to sustain a verdict in his favor if the jury should render such a verdict upon competent evidence.

APPEAL by plaintiff from judgment of *Sinclair, J.*, February Term, 1925, of NASH.

Action to recover of defendant the value of certain unregistered Liberty Loan Bonds, owned by plaintiff, and placed by him in a safety deposit box, rented from defendant, for the safe-keeping of valuable papers and securities; said safety deposit box was one of many similar boxes, placed and kept in the vault, in defendant's bank building, and rented to its customers. On 6 November, 1920, plaintiff called at defendant's bank, and then and there demanded the delivery to him of said bonds; defendant failed to deliver same to plaintiff in accordance with said demand, and has since failed to deliver said bonds to plaintiff; in his complaint, plaintiff alleges that said bonds were lost, destroyed or taken from defendant's bank, on 5 November, 1920, as "the result of defendant's carelessness, negligence, imprudence and incautiousness in protecting, keeping and preserving said bonds."

The vault in defendant's banking house, in which said safety deposit box was placed and kept, was entered during the night of 5 November, 1920, by burglars; said burglars, by means of high explosives, blew open the steel door of said vault, and violently and forcibly broke open various of the safety deposit boxes therein, and took and removed therefrom the contents of said safety deposit boxes; each of said safety deposit boxes was provided with a lock, the key to which was delivered to the customer at time the said box was rented to him; the locks of all said safety deposit boxes, however, were controlled by a master-key which was retained by defendant; the key to each box was retained by the individual customer to whom same was rented; no safety deposit box could be unlocked and opened without the use of both the individual key, which was in the possession of the customer, and the master key, which was in possession of defendant; defendant did not know and had

no means of knowing the contents of the several safety deposit boxes in the said vault; as a result of the burglary, many valuable papers and securities were stolen from said safety deposit boxes by the burglars, none of which have been recovered by defendant; defendant, in its answer, expressly denied that it was negligent with respect to said safety deposit boxes or with respect to the contents of the same; it denied that the said burglary was the result of any negligence on its part, and expressly alleged that its bank building was equipped with "standard modern steel and concrete vaults and with all other reasonable, approved and accepted devices and equipment to assure safety from fire and to protect, as far as might be, from theft and burglary"; that the safety deposit boxes provided for its customers were placed inside "its steel-doored, concrete, safety-locked vault"; and that "on the night of 5 November, 1920, the defendant's bank vault, safes and doors, having all been theretofore securely locked and bolted with combination safety locks, burglars, apparently professionals and highly skilled in the use of high explosives, with dynamite, nitro-glycerine, T.N.T., or some other powerful explosive, blew out the heavy steel door of the bank's vault and effected an entrance thereto; that they then violently and forcibly broke open various of the safety deposit boxes" and stole the contents of same.

At close of evidence offered by plaintiff, defendant moved for judgment as of nonsuit. This motion was denied, and defendant excepted. Defendant then offered evidence. At the close of all the evidence, defendant renewed its motion for judgment as of nonsuit. Motion allowed. From judgment in accordance with said motion, plaintiff appealed. The only assignment of error is based upon the judgment as of nonsuit.

I. T. Valentine and E. B. Grantham for plaintiff.
Spruill & Spruill, Finch & Vaughan, and O. B. Moss for defendant.

CONNOR, J. Plaintiff insists that there was error in allowing defendant's motion for judgment as of nonsuit, and in rendering judgment in accordance with said motion, for the reason:

First, that there was evidence of a special contract between plaintiff and defendant, by virtue of which defendant became responsible as an insurer for the safe-keeping and return of said bonds;

Second, that the relationship of plaintiff and defendant, with respect to said bonds was that of bailor and bailee, and that, as the evidence tended to show that the bonds, the property of plaintiff, were delivered by him into the possession of defendant, under a contract of bailment, and that defendant had failed to return them to plaintiff, upon his demand, the burden was upon defendant to establish, by evidence, facts

which, under the law, relieved him of liability for the return of the bonds or for damages for failure to return same.

The decided weight of authority is to the effect that the relationship between a bank and its customer, resulting from the rental by the former to the latter of a safety deposit box, with respect to the contents of said box, placed therein for safe-keeping, is that of bailor and bailee, the bailment being for hire or mutual benefit. *Trustees v. Banking Company,* 182 N. C., 298, 17 A. L. R., 1205; the fact that the safety deposit box can be unlocked and opened, and access had to its contents, only by the joint action of the customer, who has possession of the individual key, and of the bank, which has possession of the master key, does not affect the character of the relationship. The ownership of the property deposited in the safety deposit box remains in the customer; under the contract it must be kept in the place designated and agreed upon by the parties, to which access can be had only by their joint action; the place in which the property shall be kept is not to be determined solely by the bank. This is the only element of the contract which seems to differentiate it from a pure bailment as defined by the text-writers and approved by judicial decisions. Hail on Bailments; Dobie on Bailments; 3 R. C. L., 72; 6 C. J., 1084. This element is not sufficient to affect the relationship between the parties, and it must be held, both upon authority and upon principle, that the relationship between the parties to this action, with respect to the bonds, was that of bailor and bailee, for mutual benefit.

Cussen v. Southern California Savings Bank, 133 Cal., 534, 65 Pac., 1099, 85 Am. St. Rep., 221; *Reading Trust Co. v. Thompson,* 254 Pa., 333; *Safe Deposit Co. v. Pollock,* 85 Pa., 391; *The National Safe Deposit Co. v. Stead,* 250 Ill., 584; *Young v. Bank,* 265 S. W., 681; *Trainer v. Saunders,* 270 Pa., 451, 113 Atl., 681, 19 A. L. R., 861.

The interesting suggestion is made by counsel for defendant, in their brief, that the relationship between a lessor bank and a lessee customer, with respect to a safety deposit box, on principle, is that of landlord and tenant, and that the bank's possession of the contents of the box is analogous to the possession which a landlord has of the contents of the house which he has rented to his tenant. It is conceded that the greater weight of authority sustains the proposition that the relationship is that of bailor and bailee. Under a contract by which the relationship of landlord and tenant is established, both title to and possession of the subject-matter of the contract is transferred to the tenant, during the term of the lease. During said term, the landlord has no rights or duties as between himself and his tenant with respect to the property leased. The contract between the bank and its customers does not affect the title to the property, which remains in the customer, but

does result in the transfer of possession to the bank. The suggestion is interesting but not persuasive. See, however, Dobie on Bailments, page 166.

It was the duty of defendant as bailee of the bonds delivered to it by plaintiff, under a contract of bailment, for the mutual benefit of the parties, to use ordinary care and diligence in safeguarding the bonds, the property of plaintiff, bailor, and to return same to plaintiff, upon his demand. If it failed to return the bonds, and such failure was the result of a breach of duty imposed by law by reason of the relationship growing out of the contract of bailment, it is answerable to plaintiff in damages. If its failure to return the bonds, however, was not due to breach of such duty, *i.e.*, negligence, it is not liable to plaintiff for the loss of said bonds, for the law does not hold defendant, as a bailee, liable as an insurer; 3 R. C. L., 96. It is liable only for loss resulting from its failure to exercise the care required by law of a bailee with respect to the property bailed.

In *Beck v. Wilkins,* 179 N. C., 231, *Clark, C. J.*, says: "The defendant, as bailee, assumed liability of ordinary care for the safe-keeping and the return of the machine to the bailor in good condition. The bailee did not assume liability as insurer, and therefore did not become liable for the nonreturn of the property in good condition, if he observed the ordinary care devolved upon him by reason of the bailment." In *Hanes v. Shapiro,* 168 N. C., 24, *Justice Walker* says: "The parties may enlarge or diminish their liability by special contract, provided, first, that the contract is not in violation of law or against public policy; second, that the liability of the bailee is not to be enlarged or restricted by words of doubtful import; and third, that the bailee must exercise perfect good faith at all times." If the bailor seeks to hold bailee liable as an insurer, under a special contract, he must both allege and prove the special contract.

In his complaint, plaintiff alleges that he was "induced to rent the said safety deposit box and to deposit or place therein the said Liberty Loan Bonds by the advertisement and representations of defendant bank that it carried burglary insurance and that any valuables deposited in said safety deposit box would be protected by said burglary insurance." This is the only reference in the complaint to insurance against burglary; it is not an allegation of a special contract by which defendant assumed liability as an insurer of the contents of the safety deposit box or became responsible for their return. In *Sams v. Cochran,* 188 N. C., 731, there was both allegation and proof of a special contract.

Even if it be conceded that under the rule uniformly enforced by this Court for the consideration of evidence upon a motion to nonsuit, there was evidence of a special contract made with plaintiff by the cashier

of defendant, and that defendant was bound by said contract, there was no error in allowing the motion, for nonsuit, upon the ground first insisted upon by plaintiff, for it is elementary that there must be allegation as well as proof to sustain a cause of action. *Green v. Biggs,* 167 N. C., 417; *Tally v. Granite Quarries Co.,* 174 N. C., 445.

Plaintiff's assignment of error must, therefore, be considered upon the basis of defendant's liability to plaintiff for the bonds, as a bailee for him, without any additional liability because of a special contract. When the plaintiff rested, there was evidence from which the jury could find (1) that there was a contract of bailment between plaintiff and defendant, with respect to the bonds; (2) that the bonds had been delivered to defendant by plaintiff, under this contract; (3) that defendant had failed to return the bonds to plaintiff upon his demand for such return. This evidence made a prima facie case for plaintiff, for although plaintiff could not recover of defendant the value of the bonds, without a finding by the jury that defendant's failure to return the bonds was the result of negligence on the part of defendant, as alleged by plaintiff, the facts which the evidence tended to establish, with the permissible inferences which the jury might make from these facts, were sufficient to establish negligence. There was no error therefore in refusing defendant's motion at the close of the plaintiff's evidence for judgment of nonsuit.

The burden of proof, however, did not shift to defendant. This remained with the plaintiff. The evidence, making a prima facie case for plaintiff, was sufficient to take the case to the jury with the burden of the issue still upon plaintiff. Defendant had the option to take the risk of an adverse verdict, or to offer evidence to rebut the prima facie case for the plaintiff; *Hunt v. Eure,* 189 N. C., 482, and cases there cited and reviewed by *Justice Varser.* Defendant exercised the option by offering evidence. At the close of all the evidence, it renewed its motion for judgment of nonsuit (C. S., 567), contending that the prima facie case for plaintiff had been rebutted by evidence which was uncontradicted.

Upon all the evidence it appears that the bonds were stolen by burglars from the safety deposit box in which they had been deposited, during the night of 5 November, 1920; that the said box at the time the bonds were stolen was inside the vault, in defendant's bank building; that the steel door to the vault had been blown open by the use of high explosives; that the safety deposit boxes had been opened by the use of a sledge hammer and punch and a cold chisel; that the jacket or envelope in which the bonds had been placed was found, but the bonds were missing.

There was also evidence that the equipment used by defendant was of recognized, standard make, and reasonably safe, in the opinion of expert bankers; that said equipment was the same used by banks in towns of like population as Spring Hope; that the safety deposit boxes of defendant were of standard make and similar to those used in banks located in larger towns.

There was no evidence to the contrary. The facts established by all the evidence are undisputed. The inference of negligence arising from the failure to return the bonds upon plaintiff's demand is rebutted. The only inference to be drawn from all the undisputed evidence is that the failure to return the bonds was due to the burglary, and that said burglary was not the result of the negligence of defendant; *Hinnant v. Power Co.*, 187 N. C., 288; *Justice Clarkson,* writing the opinion for the Court in that case, approves the principle that where the facts are undisputed and but a single inference can be drawn from them it is the exclusive duty of the Court to determine whether a loss or injury is the result of negligence.

No facts can be found from the evidence in the record, and no inference can be drawn from the facts established by the undisputed evidence, upon which the Court could hold as a matter of law that defendant's failure to return the bonds, deposited with it as bailee, was due to its failure to exercise ordinary care for the safe-keeping of the contents of the safety deposit box, in which, under the evidence, plaintiff's bonds were on deposit on the night of 5 November, 1920, when same were stolen by burglars, who entered said vault after blowing the steel door open by high explosives, and who then broke into the safety deposit box by the use of a sledge hammer and cold chisel. The judgment based upon motion for nonsuit, which was allowed at the close of all the evidence, is

Affirmed.

ROSABELLE McCULLEN, LOU ETTA JACKSON, MARY LEE, J. G. DAUGHTRY, W. H. DAUGHTRY, LEWIS DAUGHTRY AND NORMAN DAUGHTRY v. FRANK DAUGHTRY, MINOR, AND D. J. TURLINGTON, HIS GUARDIAN, ADDIE DAUGHTRY, WIDOW OF L. H. DAUGHTRY, AND M. E. BRITT, ADMINISTRATOR, C. T. A. OF L. H. DAUGHTRY, DECEASED.

(Filed 7 October, 1925.)

1. Wills—Interpretation—Intent—Presumption.

In construing a will the presumption is against partial intestacy and the rules of construction are only for the purpose of aiding the courts in finding and effectuating the testator's intent, unless it contravenes the law or public policy.

2. Same—Bequests—"Money on Hand."

In interpreting the residuary clause of a will, money on hand will not be construed in its restricted sense when it appears that the testator otherwise intended by a proper construction of his will, and in this case it is *held* that a devise to his wife and son of his moneys on hand not only included such as he had in the bank at the time of his death, but commissions on the sale of the balance of a carload of fruit sold by his administrator *c. t. a.* after the testator's death.

APPEAL by plaintiff from SAMPSON Superior Court. *Barnhill, J.*

Action by plaintiffs to construe will of L. H. Daughtry, deceased, and to declare that the plaintiffs are entitled to certain personal property, as distributees. Judgment for defendants. Appeal by plaintiffs. Affirmed.

A jury trial was waived, and the court rendered the following judgment:

"The above entitled cause coming on for hearing before his Honor, *M. V. Barnhill, judge presiding,* at the above term of Sampson Superior Court, and being heard upon the following facts found by the court by consent of both plaintiffs and defendants, with the understanding that thereupon the court might enter judgment construing the will of L. H. Daughtry, deceased, with the right of any of the parties interested to appeal;

"Thereupon, the following facts are found by consent:

"1. That Lewis H. Daughtry died in Sampson County, North Carolina, on 28 December, 1924, leaving him surviving his widow, the defendant, Addie Daughtry, and the following children of a former marriage as his heirs at law and distributees, namely: Three daughters, Rosabelle McCullen, Lou Etta Jackson, Mary Lee; and five sons, namely: J. C. Daughtry, W. H. Daughtry, Norman Daughtry, Lewis Daughtry and Frank Daughtry.

"2. That the said Lewis H. Daughtry left a last will and testament, a copy of which is attached to complaint marked Exhibit A, and made a part of this finding of fact.

"3. That said last will and testament was duly admitted to probate in common form on 30 December, 1924, and is recorded in Record of Wills of Sampson County, Book 7, page 346, and said will having appointed no executor, letters of administration *c. t. a.* were on said date issued to the defendant, M. E. Britt, who has entered upon said administration, and has given bond as required by law for the performance of his duties as such.

"4. That at the time of his death the said Lewis H. Daughtry was the owner of certain real estate, the disposition of which is covered by items one, two, three and six of his will, about which there is now no controversy.

"5. That the said Lewis H. Daughtry at the time of his death owned certain tangible personal property, consisting of household and kitchen furniture, referred to in item four, as to which there is no controversy, and in addition thereto owned the specified items devised to his son, Frank (except the mule, which has been disposed of after the execution of the will), and besides said specific items referred to in item fifth owned one horse, one buggy and buggy harness, certain corn and fodder, and a few minor articles of insignificant value, not specifically referred to in the will.

"6. That Lewis H. Daughtry was at the time of his death engaged in selling a carload of fruit for one Waters of the city of Goldsboro, under which as consignee he was entitled to a 12% commission on net sales, and on the date of his death had on hand certain unsold fruit which the administrator, *c. t. a.*, after qualification surrendered to the said Waters; and prior to his death the said Lewis H. Daughtry had sold and collected from the sales of said fruit $1,628.90, of which sum $1,579.76 had been deposited by him in the Bank of Clinton on account in the name of Lewis H. Daughtry, "Special," the remaining $49.14 being on hand in cash, and the administrator, *c. t. a.*, deducted from the aforesaid $1,628.90 $625.02, as representing the commissions to which the said Lewis H. Daughtry was entitled for fruit sold under said contract and for freight advanced by him, and the remainder of $1,003.88 was by said administrator, *c. t. a.*, turned over to said Waters in settlement of said assignment contract and account as between the said L. H. Daughtry and Waters.

"7. That the said Lewis H. Daughtry at the time of his death had on hand money in the form of bills, notes and specie only to the amount of $20.94, which said sum represented all the cash money in his personal possession at the time of his death except the sum of $67.50 in gold coin, which the said M. E. Britt, administrator, *c. t. a.*, has by consent, distributed and divided between and among each and every one of his children, and thus leaving in his hands only the $20.94 above referred to.

"8. That the said Lewis H. Daughtry at the time of his death had deposited in the Bank of Clinton, subject to his own personal check, $842.91.

"9. That the said Lewis H. Daughtry at the time of his death had deposited in the Wayne National Bank of Goldsboro, the sum of $4,000 on interest-bearing certificate, in words and figures, as follows:

"No. 11718. Goldsboro, N. C., November 12, 1924.

"This is to certify that L. H. Daughtry has deposited with The Wayne National Bank four thousand and no/100 dollars, ($4,000),

payable on surrender of this certificate properly endorsed, with interest at the rate of four per cent per annum, if left on deposit six months from date. Interest ceases two years from date unless renewed. This bank reserves the right to require thirty days notice before withdrawal of this deposit.

"L. B. PARROTT, *Asst. Cashier.*

Certificate of deposit not subject to check."

"Upon the foregoing facts, the court adjudges that upon a proper construction of said will, and particularly item seven thereof, that all the property enumerated in items five, seven, eight and nine of the foregoing findings of fact, after first paying all debts and cost of administration, is the property of and should be paid to Addie Daughtry and Frank Daughtry in equal proportions."

The last will and testament of L. H. Daughtry is in usual form, and disposes of his lands to his widow Addie Daughtry, his minor son, Frank Daughtry, and his daughters, in items 1, 2, 3 and 6. The other items are as follows:

"Fourth: I give and bequeath to my wife Addie one-half of my household and kitchen furniture, the other half of said household and kitchen furniture I give and bequeath to my boy Frank.

"Fifth: I give and bequeath to my boy Frank, one mule, one turning plow, one cotton plow, one harrow and one weeding hoe.

"Seventh: If there should be any money on hand after paying for my funeral expenses, including a decent and honorable burying, it is to be equally divided between my wife Addie and son Frank."

Plaintiff's exceptions challenge the construction set out in the judgment.

E. G. Hobbs and Faircloth & Fisher for plaintiffs.

Graham & Kennedy, Butler & Herring and Henry E. Faison for defendants.

VARSER, J. The one question presented by this appeal is what was the true meaning and intent of the testator in the seventh item of his will when he used the words, "money on hand after paying for my funeral expenses." The intention of the testator is the guiding star in this search. Technical definitions give way to popular uses of words when the context shows a nontechnical use. *Jones v. Myatt,* 153 N. C., 225; Schouler on Wills, sec. 470; Gardner on Wills, 403; *Foil v. Newsome,* 138 N. C., 115; *Page v. Foust,* 89 N. C., 447.

There is always a presumption that a testator did not intend to die partially testate, and partially intestate. His very act in making a will

indicates a purpose to exercise the right to dispose of all his property according to his will, and not according to the provisions of the statutes in case of intestacy. *Foust v. Ireland,* 46 N. C., 184; *Boyd v. Latham,* 44 N. C., 365; *Reeves v. Reeves,* 16 N. C., 386; *Gray v. Noholoa,* 214 U. S., 108; *Powell v. Wood,* 149 N. C., 235, 238; *Peebles v. Graham,* 128 N. C., 222; *Harper v. Harper,* 148 N. C., 453, 457; *Blue v. Ritter,* 118 N. C., 580; *Cox v. Lumber Co.,* 124 N. C., 78; *Speight v. Gatling,* 17 N. C., 5; *Jones v. Perry,* 38 N. C., 200; Mordecai's Law Lectures, 1281; *Cox v. Jernigan,* 154 N. C., 584; *Austin v. Austin,* 160 N. C., 367.

The accepted rules of construction exist only for the purpose of aiding the courts in finding the testator's intention. *Galloway v. Carter,* 100 N. C., 111; *Rees v. Williams,* 165 N. C., 208. The welfare of society is promoted by the statutory right of the citizen to declare his intention which he wishes to be performed after his death in respect to his property. Blackstone says that, in the order of things, this right is necessary for the preservation of the peace of society and to avoid "an infinite variety of strife and confusion." Mordecai's Law Lectures, 1138; Blackstone (Lewis's Edition), Vol. 2, 490.

Hence, in order to preserve and perpetuate the primary principle which underlies the statutory right to make wills and testaments, we must find the intention of the testator, and give it effective force unless it contravenes the law, or public policy. *Edens v. Williams,* 7 N. C., 27; *In re Knowles,* 148 N. C., 461; *Harper v. Harper, supra; Capehart v. Burrus,* 122 N. C., 119; *Hines v. Mercer,* 125 N. C., 71; *Holt v. Holt,* 114 N. C., 241; *Houck v. Patterson,* 126 N. C., 885; *Lynch v. Melton,* 150 N. C., 595; *Rollins v. Keel,* 115 N. C., 68; *Tucker v. Moye,* 115 N. C., 71; *Dunn v. Hines,* 164 N. C., 113; *Taylor v. Brown,* 165 N. C., 157; *Lynch v. Melton,* 150 N. C., 595.

With this approach to the consideration of the testator's meaning and intention in using the term "money on hand," and mindful of the rules applicable, we are minded to agree with the construction declared by the learned judge in the court below.

Money, in its narrow and restricted sense, may mean only currency or gold or silver coin, bearing the government stamp, but in its more general and popular use, it has a much broader meaning, and indicates any current measure of value which serves the purpose of coin in its absence. In a will it may mean, if so indicated by the context, any form of property. *Kennedy v. Briers,* 45 Tex., 305; *Paul v. Ball,* 31 Tex., 10. Money will be held to include real and personal property, if the intention is shown by the context.

In the matter of the *Estate of Thomas Miller, deceased,* 48 Cal., 165, money is popularly known and used as indicating property of every

description. *Jacob's Estate,* 140 Pa. State, 268. "The rest of my money," in view of the context of a testamentary document, may cover all the residue of an estate. In the *Goods of Bramley,* 4 British Ruling Cases, 546. "The balance of my money" (*In re Miller,* 48 Cal., 165). "Whatever money is left after my burial" (*Boardman v. Stanley,* 21 Week Rep., 644). "All money that remains after all debts are paid" (*Re Blackstone,* 95 N. Y. Supp. 977). "The residue of all my money" (*Nevinson v. Lennard,* 34 Beav., 487; *Stooke v. Stooke,* 35 Beav., 396), illustrate a few of the instances of the use of the popular understanding and meaning of the term "money," when not restricted by the context. To the same effect are the following: *Montgomery County v. Cochrane,* 121 Fed. Rep., 17; *Dabney v. Dottrell,* 50 Va. (9 Grattan), 572, 579; *In re Thayer's Will,* 149 N. Y. Supp., 141; *Pohlman v. Pohlman,* 150 Ky., 679; *Dillard v. Dillard,* 97 Va., 434; Schouler on Wills, Executors and Administrators, 5 ed., Vol. 1, par. 505; Jarman on Wills, 2 Vol., 372; *Jenkins v. Fowler,* 63 N. H., 244. *Decker v. Decker,* 121 Ill., 341, holds that, "money remaining after my death" included not only actual cash, but all the other personal estate of the testator, which consisted chiefly of money loaned, and not used in paying debts, including funeral expenses.

When we come to our own decisions we find the same views declared. *Bradley v. Jones,* 37 N. C., 245; *Fulkeron v. Chitty,* 57 N. C., 244; *Apple v. Allen,* 56 N. C., 120.

A deposit in bank is, according to the common understanding, regarded as cash. *Adams v. Jones,* 59 N. C., 221. In *Page v. Foust, supra,* the word "effects" held to include land, because the will, as a whole, so indicated the intention. In *Fulkeron v. Chitty, supra,* the "rest and residue of my moneys" was held to include notes and bonds.

The testator, a man of practical affairs, may be presumed to know what is usually done in the course of the administration of estates, and that all debts and choses in action and bank deposits are reduced to cash by the personal representative; and the funeral expenses, the debts, and charges of administration are paid, and then the distribution is had. He certainly is presumed to know that "funeral expenses, including a decent and honorable burying" could not be paid out of the $20.94. This is like unto a residuary clause. The intent to use "money" in its popular sense is plain, and the judgment appealed from is a correct application of the law to the facts.

It is, therefore,

Affirmed.

IN RE WILL OF MRS. SUSAN A. HURDLE.

(Filed 7 October, 1925.)

1. **Wills—Caveat—Issues—Undue Influence — Instructions—Evidence—Appeal and Error—Presumptions.**

Upon a single issue of *devisavit vel non* on a trial to caveat a will, whereupon both the mental capacity of and undue influence upon the testator were in question with verdict in favor of the caveators, it will not be assumed that the trial judge, on the propounder's appeal, correctly instructed the jury, when the evidence on the question of undue influence is not sufficient to sustain the verdict on the single issue.

2. **Wills—Caveat—Undue Influence—Evidence—Instruction—Appeal and Error.**

Where the testator has devised her estate to the church, and the only evidence upon the question of undue influence involved in the action is the frequent visits of her pastor, that she was a generous and devoted member of the church, and had no love or affection for her heirs at law, the caveators in the present action, it is legally insufficient to show that her mind in making the will had been supplanted by the controlling will of another under the rule of law applicable, or support an affirmative answer to the issue.

APPEAL by propounders from *Sinclair, J.*, at April Term, 1925, of EDGECOMBE.

Issue of *devisavit vel non,* raised by a caveat to the will of Mrs. Susan A. Hurdle. Alleged mental incapacity and undue influence are the grounds upon which the caveat is based.

The jury returned the following verdict:

"Is the paper-writing offered in evidence the last will and testament of Susan A. Hurdle? Answer: No."

From a judgment on the verdict in favor of caveators, the propounders appeal, assigning errors.

R. T. Fountain, Geo. M. Fountain, W. S. Wilkinson and B. E. Fountain for caveators.

F. S. Spruill, S. McIntyre, J. M. Broughton and W. O. Howard for propounders.

STACY, C. J. There is but one serious exception appearing on the record: Did the court err in submitting the question of undue influence to the jury? A careful perusal of the evidence leads us to believe that this question should be answered in the affirmative and that a new trial must be awarded.

The evidence is plenary and conflicting on the question of alleged mental incapacity, and we would have no difficulty in sustaining the

validity of the trial, if the two issues of alleged mental incapacity and undue influence had been submitted separately, but the whole case was tried on the single issue of *devisavit vel non,* as above set out.

It may be conceded, for the purposes of the present appeal, that the question of undue influence was submitted to the jury under proper instructions from the court, if the evidence warranted the instructions, but we are unable to find any evidence on the record sufficient to require the submission of this question to the jury.

In the paper-writing propounded, and which was executed 5 January, 1922, the testatrix, after making certain bequests to her husband and other relatives, left the bulk of her property to the North Carolina Baptist Foundation in trust for Home and Foreign Missions and the Baptist Orphanage. She died 7 November, 1923, without leaving any child or children her surviving. She was greatly devoted to her church and Sunday school. Her will was witnessed by her pastor, Rev. W. O. Rosser, and Annie E. Combs, daughter of C. H. Spivey, one of the caveators.

A prior will, with practically the same provisions as the last one, except as to the amount to be used for missions, was executed by the testatrix in 1913. This will was witnessed by C. W. Austin and W. P. McDowell.

Seven witnesses were offered by caveators to support their allegation of undue influence. As bearing on this particular question, they testified as follows:

C. H. Spivey: "Q. State whether or not she was a woman whose mental condition was such that she could be influenced by others?

A. Those she thought a heap of she could very easily.

Q. State whether or not from the conversation you had with her you thought she was under the influence of her pastor, Mr. Rosser?

A. I think she was.

Q. Did you ever see him going to and from there?

A. Yes, sir; he went there right often.

I never have seen a lawyer going down to her house; I saw Mr. Rosser and other people going down there; Mr. Rosser was her pastor; I was there when she died; Mr. Rosser came after she died, he was not there when she died; I found out a few days after her death that she had made a will.

She told me that after her sister died (1904) she was aiming to give one-half of her sister's part to the Methodist, and the other to the Baptist; that was right after her sister died."

Dr. Richard Speight: "She would speak to me about the Kennedy Home and Thomasville Orphanage, but I don't recall any particular time; at the time she made that will I think she knew what she was doing. I think she could be influenced."

Mrs. G. N. Taylor: "I have seen Mr. Rosser in and out there; I know Mr. Rosser; he was her pastor at the time, but at the time of her death he was not."

E. J. Hurdle (husband of testatrix): "She made a will about three weeks after her sister's death (7 August, 1904); from the first will she made I thought I would be provided for in the will; I did not know that she ever made but one will; after she made the first will she told me she wanted to change her will, and said, 'I want to give it all to the Baptist Orphanage.' I said: 'It is yours; you can make disposal of it as you see fit.' I did not know she ever changed that will until after she was dead.

"Mr. Rosser told me that the will was drafted at Raleigh or Winston-Salem at the Wachovia Bank and Trust Company.

"I refused to speak to Mr. Rosser for a while; I have not spoken to him up until now; he has ceased to be our pastor three or four years, a year or two before my wife died; she had strong leanings toward the church; I don't think my wife could be influenced by an official of the church; I was under the impression Mr. Rosser did use his influence along that line, but since I saw that will this morning, the 1913 will, that will was written before he was on the field, and I am sorry and willing to apologize to him and speak to him and I am sorry that I ever accused him of that fact; he came in the field around 1915 or 1916, and left three or four years ago. The Baptist Foundation offered to give me a life estate in that land because the heirs at law who brought this suit offered the same thing.

"One winter she didn't go out for 60 days; had diphtheria."

Rev. T. L. Vernon: "I think she had great confidence in her preachers and believed what they told her."

Mrs. Jennie Weeks: "She was an educated woman and conversed well on the Bible; she knew her kin folks but did not care anything about them; they didn't care much about her; she had sense enough to know what she was doing; she knew who she was giving it to and she gave it through prejudice; she didn't want her people to have it and she didn't want Mr. Hurdle to have it."

Mrs. Ellen Lane: "Q. State whether or not you saw him (Mr. Rosser) in and out of the home of Mrs. Hurdle right often?

"A. Yes, sir, when I was in the community I would see him frequently. This was during his pastorate; I talked with Mrs. Hurdle a great deal; the topic of her conversation was Mr. Rosser, because you know she talked religion more than anything else; that was her general conversation; she did talk of Mr. Rosser."

Viewing this evidence in its most favorable light for the caveators, we think the court erred in submitting the question of undue influence to the jury.

To constitute "undue influence," within the meaning of the law, there must be something operating upon the mind of the person whose act is called in judgment, of sufficient controlling effect to destroy free agency and to render the instrument, brought in question, not properly an expression of the wishes of the maker, but rather the expression of the will of another. "It is the substitution of the mind of the person exercising the influence for the mind of the testator, causing him to make a will which he otherwise would not have made."

In short, undue influence, which justifies the setting aside of a will, is a fraudulent influence, or such an overpowering influence as amounts to a legal wrong. *In re Mueller's Will,* 170 N. C., 28; *Plemmons v. Murphey,* 176 N. C., p. 677; *In re Craven's Will,* 169 N. C., 561. It is close akin to coercion produced by importunity, or by a silent, resistless power, exercised by the strong over the weak, and which could not be resisted, so that the end reached is tantamount to the effect produced by the use of fear or force. To constitute such undue influence, it is not necessary that there should exist moral turpitude, but whatever destroys free agency and constrains the person, whose act is brought in judgment, to do what is against his or her will, and what he or she otherwise would not have done, is a fraudulent influence in the eye of the law. *In re Lowe's Will,* 180 N. C., 140; *In re Abee's Will,* 146 N. C., 273.

Quite apropos of the present case are the observations made in *Wingert's Estate,* 199 Pa., 430. Speaking of the insufficiency of a similar state of facts to show undue influence in that case, *Stewart, P. J.,* said:

"She was a woman of pronounced religious convictions and feelings, enthusiastic in her church life, and devoted to the denominational order to which she was attached. Kinship no closer than was hers, lacking the endearment that results from association and intercourse, would not strongly appeal, especially when other objects had become of deep and enthusiastic concern, and which in their nature suggested somewhat of religious duty. This circumstance is not to be overlooked in the consideration of the question before us, since the charge is that the paper does not express the mind of the testatrix, but is the expression of another's will which she was constrained to adopt as her own. . . .

"She had few cares and no dependents, and possessed of an estate more than adequate for her personal wants, she was in a position to be generous and charitable. No object was anywhere so near to her as her church. She had given to it freely and frequently, unable because of physical infirmity to attend public worship, she required frequent pastoral visitations in her home, and in this way she came to know many of the clergymen of her church. Her house was open to them, and her appreciation of their ministration was met by a corresponding appreciа-

tion on their part of her kindness. To her they were the saints; while to them she was Lydia of Thyatira come again. That intimate social and personal relations should exist is not surprising, and that under such experience her attachment to the church should grow stronger and her concern for nephews and nieces, few of whom she had ever seen, and with none of whom had she ever had but slight acquaintance, should grow weaker, is just what was to be expected. Yet it is the frequent and intimate association with the clergy of her church, their continual attendance upon her, and her marked confidence in and liberality towards them, which has given rise to the present charge of undue influence. The allegation is that these gentlemen, with a view to advantage the church to which they belonged, so practiced upon the religious feelings and convictions of the testatrix, that her freedom of will was overcome, and she was constrained to make her will in accordance with their suggestions and desires. . . .

"Even though the state of the old lady's mind was as contended for, and her subjection to the influence of the preachers be established, a most material part of the case remains to be made good. Granting that she had not sufficient power to assert her own will against the will of her clerical friends, what evidence is there that the latter, or any of them, by word or act interfered in the remotest way to control the final disposition of the old lady's estate? Upon what facts could a verdict against the will on any such ground be rested?"

There is nothing in the evidence, above set out, of sufficient probative force to warrant a verdict in the instant case for the caveators on their allegation of undue influence, and, hence, the question should have been withheld from the jury's consideration. Because of the error in this respect, there must be a new trial, and it is so ordered.

New trial.

EDWARD DILLARD v. FARMERS MERCANTILE COMPANY, INC., W. A. EDGERTON, AND N. E. EDGERTON, ADMINISTRATOR ET AL.

(Filed 7 October, 1925.)

1. Bills and Notes—Endorsers—Sureties—Statutes.

The writing of one's name upon the back of a negotiable instrument makes the person liable as an endorser, nothing else appearing, C. S., 3044; but where upon the face of the note is written that the endorsers hereto are bound as sureties, it becomes a question of law for the court, though denied by the pleadings, and the liability of such persons will be that of sureties.

2. Same—Limitation of Actions.

Where from the conditions stated upon a negotiable note, the endorsers sign as sureties, a payment thereon of the maker before the same is barred, suspends the running of the statute of limitations as to all within this class, C. S., 416, and a payment of the interest on the note by one of the sureties will repel the bar of the statute as to all of the sureties thereon.

APPEAL by W. A. Edgerton and N. E. Edgerton, administrator, from *Sinclair, J.*, at February Term, 1925, of NASH. No error.

Action upon note dated 28 January, 1913, due 1 January, 1914. Defendants, W. A. Edgerton and N. E. Edgerton, administrator, answering the complaint, admit the execution of the note as alleged and rely upon the plea of the statute of limitations as their defense to the plaintiff's action upon the note. Interest on the note was paid to 1 January, 1922. Issues submitted to the jury were answered as follows:

1. Is the note sued upon barred by the statute of limitations? Answer: No.

2. Are the defendants, N. E. Edgerton, administrator, and W. A. Edgerton indebted to plaintiff and if so, in what amount? Answer: $2,500 and interest from 1 January, 1922.

From judgment upon this verdict against appellants, and by default against the other defendants, the answering defendants appealed to the Supreme Court.

Finch & Vaughan and Manning & Manning for plaintiff.
Austin & Davenport and S. Brown Shepherd for defendants.

CONNOR, J. On 28 January, 1913, the Farmers Mercantile Company, Inc., executed its promissory note to plaintiff in words and figures as follows:

"$2,500. Selma, N. C., 28 January, 1913.

"Without grace, on the first day of January, 1914, we the Farmers Mercantile Company, Inc., as principal, and the other endorsers hereto as sureties, promise to pay to Edward Dillard, Spring Hope, N. C., twenty-five hundred and no/100 dollars, negotiable and payable with interest at the rate of six per cent per annum, payable semiannually, for value received, being for money borrowed. All parties to this note hereby agree to continue and remain bound for payment of this note and interest, notwithstanding any extension of time granted to the principal debtor, and notwithstanding any failure or omission to protest this note for nonpayment or to give notice of nonpayment or dishonor or protest, or to make presentment or demand for payment, hereby expressly waiving any protest and any and all notice of any extension of time or

of nonpayment or dishonor or protest in any form, or any presentment or demand for payment or any other notice whatsoever.

FARMERS MERCANTILE COMPANY,
"Corporate Seal. By WALTER G. WARD, *Prest.*"

Defendants herein, stockholders of Farmers Mercantile Company, wrote their names on the back of said note as follows: Walter G. Ward, W. A. Edgerton, G. C. Earp, N. E. Ward and N. E. Edgerton. N. E. Edgerton is dead and the defendant, N. E. Edgerton, his son, has been duly appointed as his administrator.

Interest on this note was paid annually by the Farmers Mercantile Company until 1 January, 1918. On 14 October, 1918, the Farmers Mercantile Company was duly dissolved as a corporation. Interest was thereafter paid on said note by Walter G. Ward and G. C. Earp, whose names appear on the back thereof, until 1 January, 1922. No other or further payments have been made on said note. Summons in this action was issued 7 June, 1922. Defendants allege that more than three years elapsed from the date the cause of action on the note accrued as to them to the commencement of this action; that no payment made on said note arrested the running of the statute of limitations as to them; and that therefore the action on the note as to them is barred. The contentions upon these allegations are duly presented by exceptions upon which assignments of error upon appeal are based.

Defendants present, first, for consideration their contention that they are endorsers and therefore liable only secondarily upon the note sued on; plaintiff contends that they are sureties, and therefore liable primarily as makers. *Rouse v. Wooten,* 140 N. C., 557. The effect of the payments made on the note upon the running of the statute of limitations as to defendants will be determined by their relationship to the note, and the character of their liability.

Defendants placed their names on the back of the note; they are, therefore, nothing else appearing, endorsers and liable on the note only as endorsers. C. S., 3044. *Perry v. Taylor,* 148 N. C., 362; *Houser v. Fayssoux,* 168 N. C., 1; *Bank v. Wilson,* 168 N. C., 557; *Meyers v. Battle,* 170 N. C., 168; *Barber v. Absher Co.,* 175 N. C., 602; *Gillam v. Walker,* 189 N. C., 189; however, on the face of the note, upon the back of which defendants wrote their names, they acknowledge that they are "endorsers hereto as sureties," and thus clearly indicate by appropriate words their intention to be bound, not as endorsers, but as sureties. Their relationship to the note must be determined by their intention at the time they wrote their names upon the note; 3 R. C. L., 1123, secs. 339 *et seq.:* nothing else appearing to indicate clearly a contrary intention, the place upon which these signatures appear on the note,

would be conclusive that they intended to become endorsers. C. S., 2998, subsec. 6; the words in the note, however, indicate clearly an intention to be bound in some other capacity than as endorsers. C. S., 3044. It must be held, in accordance with the terms of the note, that defendants are sureties and that their rights and liabilities, with respect to same must be determined by the law applicable to sureties and not to endorsers. Defendants by their answer to paragraph 4 of the complaint, do not admit the allegation that they are sureties on said note, but by their admission that they executed the note as set out in the complaint, present the question as to their relationship to the note to the Court for determination as a matter of law. There was no error in holding that they are sureties.

It is clear that the annual payments of interest on the note, made by the Farmers Mercantile Company, the principal, renewed the same to 1 January, 1918, both as to the company and as to defendants, who as sureties were liable to the plaintiff, payee of the note, as makers. C. S., 416. In *Houser v. Fayssoux,* 168 N. C., 1, *Justice Brown* says that it is well settled in this State that a payment by the principal on a note, before the bar of the statute, operates as a renewal of the debt as to himself and also as to the sureties on the note; the note sued on was therefore extended, as to principal and sureties, to 1 January, 1918.

What was the effect of subsequent annual payments of interest made by Walter G. Ward and G. C. Earp, cosureties with defendants, the last payment having been made on 1 January, 1922?

In *Barber v. Absher Co.,* 175 N. C., 602, *Justice Allen* says: "It is also settled that a payment, to have the effect of repelling the statute of limitations must be made by one in the same class and that a payment by the maker does not continue the right of action against the endorser." The relation of an endorser to the note differs from that of a surety, the liability of the latter being primary, that of the former secondary. Defenses available to an endorser, are not available to a surety, the distinction being founded upon the difference in their liability. As between the principal and sureties, and as between cosureties there is a community of interest and a common obligation. The right of a surety who has paid the debt to call upon the cosurety for contribution is upheld upon this principle. *Gillam v. Walker,* 189 N. C., 189. Payment by one surety on the debt for which there is a common liability, with right of contribution, before an action on the debt is barred, renews it as to cosureties. C. S., 417. The note sued on was extended as to all the defendants to 1 January, 1922, by the payments made thereon by Ward and Earp.

There was no error in the instruction of his Honor upon the first issue. Defendant's assignments of error cannot be sustained. There is

No error.

J. B. COLT COMPANY v. L. L. SPRINGLE AND DAISY SPRINGLE.

(Filed 7 October, 1925.)

Contracts—Parol Evidence—Vendor and Purchaser—Statute of Frauds.

Where a contract given for the balance of the purchase price of a lighting plant states that the contract is entire as therein expressed, and that it may not be varied by parol, the purchaser in an action against him may not by his parol evidence maintain the defense that the company by its sales agent had guaranteed the good working condition of the plant for a period of years, etc., there being no evidence of fraud in the factum.

APPEAL by plaintiff from CARTERET Superior Court. *Barnhill, J.*

Action to recover on note for $298.25 executed by defendants for a lighting plant purchased from plaintiff. Judgment for defendants on a jury verdict. Plaintiff appeals. New trial.

The verdict is as follows:

"1. Was the execution of the note and contract as set out in the complaint procured by false and fraudulent representations, as alleged? Answer: Yes.

"2. If so, what damage, if any, is the defendant entitled to recover of plaintiff? Answer: $44.00.

"3. Did the plaintiff at the time of the execution of this contract, warrant the apparatus furnished to be a thoroughly durable galvanized steel acetylene generator, automatic in action, and of good material and workmanship, as alleged?

"4. If so, did plaintiff breach said warranty?

"5. If so, what damage, if any, is the defendant entitled to recover by reason of said breach?"

The defendant pleaded fraud in the execution of the contract and breach of warranty.

The judgment was against the plaintiff on the note and for the damages assessed in the verdict.

G. W. Duncan and J. W. Mason for plaintiff.
C. R. Wheatley for defendants.

VARSER, J. The plaintiff's exceptions contest the admissibility of evidence that plaintiff's agent stated that the lighting plant would last "from ten to twenty-five years; that if same went bad company would make all necessary repairs; that generator was made of 5-16 galvanized steel; that thickness of generator was 12-16, and that plaintiff would guarantee same (plant) for ten years." This evidence was all admitted on the first issue.

The contract, the execution of which was admitted, contained the following provision:

"It being understood that this instrument, upon such acceptance, covers all of the agreements between the purchaser and the company, and that no agent or representative of the company has made any statements, representations or agreements, verbal or written, modifying or adding to the terms and conditions herein set forth. It is further understood that upon the acceptance of this order, the contract so made cannot be canceled, altered or modified by the purchaser or by any agent of the company or in any manner except by agreement in writing between the purchaser and the company acting by one of its officers."

And the following warranty:

"It is agreed that in accepting this order the company warrants the apparatus furnished to be a thoroughly durable galvanized steel acetylene generator, automatic in action, and of good material and workmanship, and that it is on the permitted list of the National Board of Fire Underwriters."

The defendant, L. L. Springle, testified that the plant was satisfactory at time of installation, and that he "had full opportunity to read contract and read same." There is no evidence that there was fraud in the factum. This defendant says the plant was satisfactory at time of installation and that he wrote several letters to plaintiff, after the plant had been in use, asking for leniency in terms, and stating he was doing all in his power to pay the purchase price, at one time saying he could not pay on account of failure to obtain a contemplated loan, and in some, enclosing payments, and in others, promising to pay, when possible. The defendant says, also, that the "statements of agent applied only to future service of plant."

In the light of these statements by defendant, the evidence objected to is not competent. The contract, which was read by the defendant, stipulates expressly against these oral declarations. Upon this record, there is no fraud and misrepresentations in procuring the defendants' signatures to the contract, or to the "purchaser's statement" as to the installation. He cannot, now, show a parol warranty other than, or differing from, the written warranty in the contract. *Machine Co. v. McClamrock,* 152 N. C., 405; *Harvester Co. v. Carter,* 173 N. C., 229; *Murray Co. v. Broadway,* 176 N. C., 151; *Guano Co. v. Livestock Co.,* 168 N. C., 447; *Simpson v. Green,* 160 N. C., 301.

However, the jury did not answer the issues as to the warranty in the contract, because they were instructed not to do so if they answered the issue as to fraud in favor of the defendants. Hence, the defendants are entitled to have these issues again submitted to a jury.

Therefore, there will be a

New trial.

AGNES RIGSBEE, ADMINISTRATRIX OF EDWARD W. RIGSBEE v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 7 October, 1925.)

1. Negligence—Railroads—Evidence—Questions for Jury—Nonsuit.

Where there is evidence tending to show that the defendant railroad company had left a space between the cars in its stationary freight train on its yard, where it had continuously permitted its employees and others to pass in large numbers, and plaintiff's intestate, an employee, was killed there by a train rapidly moving on a close parallel track beyond, coming without signals or the customary warnings of its approach: *Held*, the failure of the defendant to give the customary warning on its moving train is sufficient on the issue of its actionable negligence to deny defendant's motion as of nonsuit thereon.

2. Same—Contributory Negligence—Burden of Proof.

Under the facts of this case: *Held*, the mere fact that the defendant's employee may not have stopped, before going upon the track whereupon he was killed by the defendant's negligence in not giving the customary signals of its approach, did not bar him of his right to recover, as the sole, proximate and efficient cause.

3. Negligence—Railroads—Death—Measure of Damages.

To ascertain the damages recoverable by the administratrix of the deceased for his negligent killing by the defendant, the net-earnings rule requires the jury to deduct only the reasonably necessary personal expenses of the deceased, and not the amount spent by him for his family or dependents, and testimony of a witness relatively construed that bases his estimate upon the witness' knowledge of the habits of the deceased, in this connection is properly admitted.

4. Appeal and Error—Evidence—Harmless Error.

Where corroborative evidence is erroneously excluded, its subsequent admission will render the error harmless.

APPEAL by defendant from *Cranmer, J.*, at April Term, 1925, of EDGECOMBE.

Civil action to recover damages for the intestate's death which occurred 15 March, 1923. The jury returned the following verdict:

1. Was the plaintiff's intestate killed by the negligence of the defendant, as alleged in the complaint? A. Yes.

2. Did the plaintiff's intestate, by his own negligence, contribute to his death? A. No.

3. What damage, if any, is plaintiff entitled to recover? A. $15,000.00.

Defendant appealed from the judgment, assigning error.

R. T. Fountain and George M. Fountain for plaintiff.

Thos. W. Davis, V. E. Phelps, F. S. Spruill and Bridgers & Bourne for defendant.

ADAMS, J. The circumstances under which the plaintiff says her intestate suffered death are set out in the complaint and related in the testimony of her witnesses. The injury occurred about three-quarters of a mile from South Rocky Mount. At this place the defendant has two main lines, using the east line for northbound trains and the west line for trains moving southward. To the east of the northbound line is a track known as the lead track or the "Florence Lead," connecting the north and south freight yards and the Y. D. tower. Between the east and west main lines and between the east main line and the "Florence Lead" the distance is about three feet. Ten feet east of the "Florence Lead" there is a building designated in the record as the "D. I. office." The roadbed is lower than the adjacent ground, and for this reason the defendant keeps up a bridge extending from the embankment in front of the D. I. office to the lead track and another extending from the west embankment to the southbound line. Near the office were other tracks or switches, the relative situation of which it is not necessary to describe. On 15 March, 1923, to make use of needed space in one of the yards, the defendant pulled down on the lead track a freight train made up for Wilmington and left it standing near the place of the injury. Close to the bridge extending from the east embankment to the lead track there was an open space between two of the cars in this train covering a distance, according to the several estimates of the witnesses, ranging from five to fifty feet. There is evidence that for a number of years this crossing has been used, not only by the employees of the defendant, but by others, one witness testifying that in his opinion a thousand people cross the track at this place every day.

The plaintiff's intestate was an employee of the defendant, serving in the capacity of switchman or brakeman. He had been called for the 3 o'clock shift and a short time before his death had been seen cleaning his lantern on the rear porch of the D. I. office. A short time afterwards (about 3:10 p. m.), the defendant's train with seven or eight cars approached on the northbound track. It had come from Florence and was going in the direction of Rocky Mount. According to the plaintiff's evidence it was running forty miles an hour; and while it is usual for trains to blow for the crossing (R., p. 14), on this occasion no signal or warning was given by sounding the whistle or ringing the bell. The plaintiff's intestate, coming from the D. I. office, passed through the open space between the box cars and while in the act of crossing the east main line was struck by the engine and killed. Evidence on behalf of the defendant tended to show that the proper signals

were given and that the intestate heedlessly ran upon the track in front of the train and solely by his own negligence caused his injury and death.

The defendant contends that upon its motion the action should have been dismissed as in case of nonsuit. Exceptions 2 and 4. This position cannot be maintained. It was unquestionably the duty of the defendant in the exercise of due care to give timely warning of the train's approach by sounding the whistle or ringing the bell, or by both means if reasonably necessary, and if it failed to perform this duty such failure was evidence of negligence, requiring determination by the jury of all matters involved in the first issue. *Costin v. Power Co.*, 181 N. C., 196; *Jackson v. R. R., ibid.*, 153; *Perry v. R. R.*, 180 N. C., 290; *Bagwell v. R. R.*, 167 N. C., 611; *Hill v. R. R.*, 166 N. C., 592; *Jenkins v. R. R.*, 155 N. C., 203; *Norton v. R. R.*, 122 N. C., 910; *Hinkle v. R. R.*, 109 N. C., 472. The specific contention, that, as a proposition of law, the intestate's negligence was essentially the sole cause of his injury and death and a consequent bar to the recovery of damages, is not in accord with our decisions. We adhere to the principle that qualifying facts and conditions may so complicate the question of contributory negligence as to make it one for the jury even when there has been a failure to look or listen (*Cooper v. R. R.*, 140 N. C., 209); and surely upon the facts disclosed in the case at bar we cannot hold as a legal inference that the intestate's alleged negligence was such as entitles the defendant to a dismissal of the action. It is incumbent upon the defendant to establish contributory negligence as a matter of affirmative defense. *Jackson v. R. R.*, 181 N. C., 153; *Goff v. R. R.*, 179 N. C., 216; *Lea v. Utilities Co.*, 178 N. C., 509; *Lutterloh v. R. R.*, 172 N. C., 116; *Davidson v. R. R.*, 170 N. C., 281; *Shepard v. R. R.*, 166 N. C., 539. In *Davidson v. R. R.*, 171 N. C., 634, it is said that where a pedestrian without looking or listening goes in the daytime upon a railroad track, the view of which is unobstructed, and is injured thereby, his own negligence will be deemed the proximate cause of his injury and will preclude his recovery See, also, *Coleman v. R. R.*, 153 N. C., 322; *Trull v. R. R.*, 151 N. C., 545; *Parker v. R. R.*, 86 N. C., 221. But in the present case there is evidence tending to show that the intestate's view was obstructed and that he could not have seen the approaching train until he had come within one step of the track, and even then only by "sticking his head around the box car after getting down on the bridge." Whether he approached the track rapidly or slowly was a matter for the jury. Considering the entire evidence we think the defendant's motion for nonsuit was properly denied.

A witness for the plaintiff, after testifying as to the character, the habits, and the earning capacity of the intestate, said: "It is not my opinion that he spent much money on himself as distinguished from his family." To this the defendant excepted. In ascertaining net earnings the rule requires the jury to deduct only the reasonably necessary personal expenses of the deceased and not the amount spent for his family or those dependent upon him. *Carter v. R. R.*, 139 N. C., 500; *Roberson v. Lumber Co.*, 154 N. C., 328. The evidence excepted to must be considered in its relation to the preceding testimony of the witness, and when so considered it is not objectionable as a mere expression of opinion. It is apparent that this clause was an estimate based upon observation and knowledge of the intestate's industry and habits. *Taylor v. Security Co.*, 145 N. C., 383. The first exception, then, must be overruled.

The third exception also is without merit. The engineer, testifying on behalf of the defendant, offered to repeat a remark he had made to the fireman, probably concerning the ringing of the bell, although the substance of the remark is not set out in the record. *Snyder v. Asheboro*, 182 N. C., 708. But if the purpose was to show that the bell had in fact been rung and was still ringing, this circumstance was afterwards related by the engineer and the fireman. R., pp. 37, 52.

The fifth exception is addressed to an instruction which is a literal excerpt from the opinion in *Cooper v. R. R., supra.* It is perfectly evident that his Honor intended merely to state an established principle of law to be applied by the jury to the evidence relating to the second issue. He did not assume or intimate that the intestate's view was in fact obstructed, as contended by the plaintiff, and herein the instruction excepted to differs from that which was disapproved in *Withers v. Lane*, 144 N. C., 184.

The prayer for instruction which is the subject of the sixth exception runs counter to recognized principles in this class of cases. It was not the absolute duty of the intestate to stop, look, and listen simply because the defendant's track is a place of danger. There is no authority for holding that the law imposed upon the intestate the unqualified duty to *stop* before going upon the track. *Jackson v. R. R., supra,* and cases therein cited. The prayer is objectionable for the further reason that it disregards the alleged negligence of the defendant as a factor tending to explain the conditions under which the intestate approached the track. *Johnson v. R. R.*, 163 N. C., 431. Upon the same principle, and for the additional reason that the prayer omits all reference to the question of proximate cause, the seventh exception must be overruled. So likewise as to the eighth and ninth. Whether the crossing is technically a highway is immaterial. It was used by the

public as well as by the defendant's employees and whether the defendant exercised due care in the operation of its train at the place of the injury was a matter to be considered by the jury in connection with the character of the crossing and the defendant's knowledge of its use. The remaining exception is formal and requires no discussion.

We find

No error.

J. H. MITCHELL v. TOWN OF AHOSKIE.

(Filed 7 October, 1925.)

1. Pleadings—Damages—Nuisance—Burden of Proof—Sewage—Municipal Corporations—Instructions—Appeal and Error.

Though in proper instances permanent damages may be recovered in an action against a town caused by the improper emptying of its sewer upon the plaintiff's land, it is necessary that an issue to that effect be raised by the pleadings with supporting evidence; and where it is alleged that the town had acquired by condemnation the right to construct and maintain the sewer on plaintiff's land with an outlet beyond that would not have caused the damage complained of, the amount of damages recoverable are only what the plaintiff has sustained up to the trial of the action.

2. Judgments—Default and Inquiry—Damages—Pleadings.

A judgment by default and inquiry upon the failure of defendant to answer establishes the plaintiff's right to recover damages, at least nominal, in accordance with his allegations, with the burden on him to show the extent of the damages he has sustained.

APPEAL by plaintiff from judgment of *Bond, J.*, at December Term, 1924, of HERTFORD. New trial.

Summons in this action was issued on 29 April, 1922, and duly served on defendant. Verified complaint was filed by plaintiff on 19 June, 1922; no answer having been filed by defendant, upon motion of plaintiff, judgment by default and inquiry was rendered on 18 September, 1922. At December Term, 1924, a jury having been duly empanelled, an issue was submitted to the jury and answered as follows:

"What damage has the plaintiff sustained by the negligent failure of the defendant to construct its sewer line as it contracted to do? Answer: $750."

Judgment was thereupon rendered that plaintiff recover of defendant the sum of $750 and the costs of the action. It was further adjudged that "payment of this judgment shall vest in defendant the right to permanently maintain its sewer line as it now is." From this judgment plaintiff appealed, assigning as error the instruction of the

court as to the measure of damages, and so much of the judgment as decrees that payment of the judgment should vest in defendant the right to maintain permanently its sewer line as it now is.

Bridger & Eley, Stanley Winborne, and Jones, Jones & Horton for plaintiff.

Murray Allen and Craig & Pritchett for defendant.

CONNOR, J. The judgment by default and inquiry established plaintiff's cause of action as alleged in his complaint, and his right to recover of defendant at least nominal damages. Both plaintiff and defendant are concluded by said judgment as to all matters alleged in the complaint as a basis for plaintiff's right of recovery. The cause of action set out in the complaint, and adjudged by the court to be well founded, both in fact and in law, determines the measure and character of damages which the plaintiff is entitled to recover therein from defendant. He is entitled to damages which flow from or arise out of said cause of action—no more and no less. The amount of these damages, to be ascertained by the jury from evidence relevant to an appropriate issue, only, is left open for inquiry. C. S., 596. *Hill v. Hotel Co.*, 188 N. C., 587; *Armstrong v. Asbury*, 170 N. C., 160; *Plumbing Co. v. Hotel Co.*, 168 N. C., 577; *Graves v. Cameron*, 161 N. C., 550.

In *Blow v. Joyner*, 156 N. C., 140, *Justice Hoke* quotes from the opinion of this Court in *McLeod v. Nimocks*, 122 N. C., 438, with approval, the following: "The judgment by default and inquiry, the defendant having said nothing in answer to plaintiff's complaint, was conclusive that the plaintiff had a cause for action against the defendant of the nature declared in the complaint and would be entitled to nominal damages without any proof." The learned *Justice* further says: "The statement sometimes made that a judgment of this kind 'merely admits a cause of action, while the precise character of the cause of action and the extent of defendant's liability remains to be determined,' simply means, as stated, that a judgment by default and inquiry establishes a right of action in plaintiff of the kind stated in the complaint, and entitling plaintiff to nominal damages, but the facts and attendant circumstances giving character to the transaction and relevant as tending to fix the quantum of damages, must be shown."

It appears from the allegations of the complaint that plaintiff is now and has been for many years the owner of a farm lying within or adjacent to the corporate limits of the town of Ahoskie. During September, 1920, defendant, as a municipal corporation, was engaged in the construction of a water and sewer system for the benefit of said town and its inhabitants. It desired to extend its sewer line from

the south end of West Street in said town through plaintiff's farm to Ahoskie Swamp, where the discharge from said sewers would be carried off by the flow of said swamp. Plaintiff and defendant on 4 September, 1920, entered into a written contract by which plaintiff granted to defendant, in consideration of the payment to him of $1,000, a right of way for said sewer line, 18 feet wide, running from the south end of West Street through said farm to Ahoskie Swamp. Said right of way was to be used by defendant while the construction of the line was going on and after same was finished.

In his complaint, plaintiff alleges that defendant carelessly, negligently and wilfully failed to extend said sewer line to the run of Ahoskie Swamp, as it had contracted and agreed to do, and that by reason of such failure the contents of the sewer pipe were discharged upon and spread over his land, thus causing a nuisance; the plaintiff's pasture located upon said farm, in which he kept his milk cows, by reason of the deposits thereon from the sewer was made unfit as a place to keep said cows, the soil being rendered filthy and the water unwholesome by reason of said deposits.

Plaintiff further alleges that the sewer line was not extended to the high-water line of the run of Ahoskie Swamp, as the defendant had contracted and agreed to do, and that resulting from this the contents of the sewer were not carried to the run of Ahoskie Swamp, but were discharged upon plaintiff's lands and premises, which thereby became polluted, poisoned and rendered unfit for use or occupation by the plaintiff.

The judgment by default having established plaintiff's right to recover damages, the burden was upon plaintiff to offer evidence at the trial upon the issue submitted to the jury. He testified that the distance from the street to Ahoskie Swamp is about 1200 yards; that the sewer line has never been carried to the run of the swamp; that it now terminates in his field about 400 yards south of Church Street and about 250 yards southwest of his residence. He testified fully as to the conditions thus caused upon his land. The sewer line as constructed by the defendant ends in a little bog that makes up from the swamp. The sewage is deposited in this bog and causes a nuisance.

The mayor of the town of Ahoskie, testifying as a witness for the defendant, said: "The town has not had the money to carry the sewer line to the run of the swamp, and in all probability it would have been extended if the money had been available."

The court instructed the jury that the measure of damages was the difference between the actual market value of the land with the sewerage connections as put down, and the actual value with the sewerage pipes installed according to the contract; that the burden was upon the plaintiff to satisfy the jury on these facts—the value of the land as it

was when sewerage was put down and what it would have been at that time if the contract had been complied with. To this charge plaintiff excepted and assigned same as error. His Honor, over objection of plaintiff, included in the judgment as signed, the following words: "Payment of this judgment shall vest in the defendant the right to permanently maintain its sewer line as it now is." To the judgment as signed, plaintiff excepted and assigns same as error.

Plaintiff's contention is that it was error for his Honor, in his instruction to the jury as to the measure of damages and in the judgment which he rendered, to construe plaintiff's cause of action as one in which he was entitled to permanent damages for property taken by defendant, a municipal corporation, under the power of eminent domain. The right of a plaintiff to recover permanent damages for an entire injury caused by the taking of his property by a corporation upon which the power of eminent domain has been conferred, in certain cases, has been recognized and enforced in this jurisdiction. *Ridley v. R. R.,* 118 N. C., 996; *Parker v. R. R.,* 119 N. C., 677; *Harper v. Lenoir,* 152 N. C., 728; *Moser v. Burlington,* 162 N. C., 141; *Rhodes v. Durham* 165 N. C., 679.

In this case defendant, a municipal corporation, has acquired by purchase the right of way over plaintiff's land for its sewer line. Its entry upon said right of way and construction of a sewer line thereon was not wrongful. Plaintiff is not seeking further payment for the land upon which defendant maintained permanently said sewer line, nor is plaintiff seeking damages for injury to his land or premises resulting from the permanent maintenance of the said sewer. He demands damages for injuries caused by defendant's failure to complete the sewer line by extending it to the swamp. Upon the cause of action set out in the complaint he neither asks for nor is entitled to permanent damages. Nor has defendant, in its answer, claimed the right to maintain the present condition, permanently. The injury is not permanent, but is the result of defendant's admitted failure to extend its sewer line to the swamp, such failure being due, as the mayor testified, to the inability of the town, because of its present financial condition, to complete its sewer system in accordance with its plans, and its contract and agreement with the plaintiff.

In *Ridley v. R. R., supra, Justice Avery,* after a thorough investigation of authorities, and an exhaustive consideration of the question, for the Court, deduces certain principles applicable to the recovery of permanent damages. He says that it is the legal right of a plaintiff or defendant to have permanent damages assessed in an action for damages resulting from the taking of private property for public use, under the power of eminent domain, upon demand made in the pleadings.

No such demand has been made in this case by either plaintiff or defendant. No issue involving permanent damages has been submitted to the jury.

The source of the injury—*i.e.*, the failure to extend the sewer line to the swamp, in accordance with the contract, is not permanent in its nature. The nuisance caused thereby can and will be abated by the extension of the sewer line to the swamp. The injury will cease when defendant has complied with its contract. See *Jackson v. Kearns*, 185 N. C., 417.

Plaintiff is entitled to recover only the damages which have accrued to him from defendant's wrongful conduct up to the trial of the action. It was error, therefore, without demand of either plaintiff or defendant for permanent damages, to instruct the jury that the measure of damages in this case is the difference in the value of plaintiff's lands with the sewer line as it is and the value if the sewer line had been extended to the swamp, and to include in the judgment a decree that the payment of the damages assessed shall vest in the defendant the right to maintain the sewer line in its present incomplete condition. Plaintiff, upon the cause of action set out in the complaint and established by the judgment of the court, is entitled to recover of defendant all damages sustained by him up to the trial, resulting from the negligent failure of defendant to extend its sewer line to the swamp. The issue submitted to the jury does not involve permanent damages. The assignments of error are sustained and there must be a

New trial.

STATE v. C. A. MEYERS.

(Filed 7 October, 1925.)

1. Intoxicating Liquor—Evidence—Turlington Act—Nonsuit.

A motion for nonsuit upon the evidence on the trial for a violation of the prohibition law, will be denied when, though circumstantial, it is sufficient upon the question of possession and unlawful transportation of intoxicating liquor.

2. Same—Possession—Instructions—Appeal and Error.

The possession of spirituous liquor in contemplation of the Turlington Act may be either actual or constructive, but must be such as to place it within the control or use of the defendant upon trial, and it is insufficient if it was found upon lands he had leased, with his knowledge of its having been there; and an instruction to the jury otherwise is reversible error.

STATE *v.* MEYERS.

APPEAL by defendant from SAMPSON Superior Court. *Lyon, J.*

Indictment for violation of prohibition law, and from a judgment pronounced upon a verdict of guilty, the defendant appeals. New trial.

The defendant was charged with possessing, transporting, exporting, importing, purchasing and receiving intoxicating liquors in violation of the Turlington Act, which is chapter 1, Public Laws 1923.

The State's evidence tended to show that two officers, Honeycutt and Tew, searched the defendant's premises for intoxicating liquors three times; the first search on Sunday in August, 1923, resulted in finding nothing; on a Monday in September they searched again the premises and found no whiskey this time, but did find an impression on the ground in 15 steps, and in the rear, of the defendant's barn. This impression was like that of a jug. The defendant was not then at home. The third search was in November; the defendant was present and they found no evidence of liquor in his dwelling or outbuildings, but did find a track leading from the barn, which was on the other side of the public road from the dwelling, and this track went from the barn down to his hog lot in a mulberry orchard down beside the public road in a corner of his field near to Mrs. Denning's field. This track from the barn down beside the hog lot led on to Mrs. Denning's line fence; there a woman's track was coming toward the public road, joining the other tracks, and these tracks went down beside the line fence on defendant's side of the line fence to a ditch in defendant's field. This ditch was some 75 yards from the hog lot and about 100 yards from the public road. The tracks thence led down the ditch about 20 yards from the line fence; and these officers, following the tracks, found there a three-gallon jug in the ditch, about two gallons of whiskey in the jug. The ditch and the jug were about 150 yards from defendant's dwelling on the lands that he had rented from one Tart for that year. The officers did not find any tracks from the jug in the ditch to defendant's house or barn. Further down the same ditch they found a five-gallon jug in an old fertilizer sack near the end of the bridge over the ditch. This jug had only the odor of whiskey in it.

One Blackman testified that, on the day in September when the officers searched defendant's premises, he visited the premises and found a three-gallon jug, about half full of whiskey, in the pea vines about 15 steps just back of defendant's barn, and there were tracks leading to and from the jug towards the barn. This jug was where the impression on the ground was discovered by the two officers.

There was evidence tending to show defendant's bad character.

The defendant's evidence tended to show, as testified by defendant himself, that he was a tenant farmer, 35 years old; rented the farm from Tart in 1924, and that he did not drink or sell whiskey, and did not have any; that the officers came to his home in August and wanted to search his premises and he told them to search all they wanted to; that they searched his buildings and found no whiskey; that in September when they came back they searched his buildings again and found nothing, except the print in his cornfield of a bucket where his wife was gathering roasting ears; that in November when the officers came and wanted to search he told them to proceed, and that they opened up his buildings and found nothing; that Mr. Honeycutt went from his barn down to the mulberry orchard where the defendant had formerly come to and from feeding his hogs. The mulberry orchard is about 200 yards down the public road at the corner of the field next to the road and Mrs. Denning's fence; that the officer then went about 45 yards down the fence to a ditch and came back with a two-gallon jug half full of corn whiskey, which he said he found in the ditch about 12 feet from Mrs. Denning's fence. Defendant said he knew nothing about the whiskey and had not been at that ditch or in the field near to the ditch since May, when he cut oats. The field was not cultivated after the oats were cut; that he saw the tracks from the public road leading to and from the jug, but they were not his tracks, they were larger. These tracks led from the public road near Mr. Jones' residence, 205 yards down the road from his home. These tracks came down beside the fence on the Denning side and got over the fence into the field at the ditch where the jug was. Several other people saw these tracks. There were no tracks across the oat patch leading up to the house. There was a marriage at his house on Saturday night before the liquor was found Monday morning. His brother-in-law, who lived with him, got married. There was a crowd there Saturday night late and some were drinking and he made two men leave. He did not know where they got their liquor; did not see any or drink any. There was an orchard on this place and his wife had some fruit jars in the house in which to can the fruit; they were new jars, and never had any whiskey in them. His wife was unable to attend the trial.

R. A. Denning testified that he put the jug in the sack under the bridge; that he was going to Coats for syrup and Mrs. Meyers, who was in the field cutting corn, told him that Coats' syrup was sour and could not be used; that he stopped and helped her cut corn and set the jug under the bridge; that it was about 10 September when he left his jug there; that he was over to defendant's house when defendant's wife was gathering roasting ears in the field; that she set a water bucket

his duties as a justice of the peace, since his appointment as such; that he has tried to show the officials of the city of Greensboro and of Guilford County, for whom he at one time worked, "that although a man can sometimes be 'down,' he need not necessarily be 'out' "; and that he has earnestly endeavored in every way possible to regain the confidence and esteem of the community—in testimony of which he files a large number of character certificates from many citizens of high standing and repute in the city of Greensboro and Guilford County. In addition, the respondent declares to the Court his intention to persist in living a better life, which is highly commendable.

He alleges that the protestant is wholly mistaken in her allegations touching his connection with the divorce proceeding. Without any ill will towards her and without any desire on his part to strike back, for he alleges that his former wife was a young woman of character and refinement at the time of their marriage in 1914, the respondent suggests that she is displeased because he was married again in the fall of 1924, about two months after the divorce, and is now living happily with his second wife, and that the protestant, Mrs. Martha H. Duke, is actuated by improper motives in filing this protest.

The undisputed facts, appearing on the record, call for but little comment; they speak for themselves. It is conceded that the respondent was discharged as a deputy sheriff of Guilford County in 1922, because of his unfitness to hold the position. At the August Term, 1924, it was solemnly adjudged by the Superior Court of Guilford County that the respondent "is not a fit and suitable person to have the care and custody of his minor child." This finding would not have been made without evidence to support it, and it will be observed that the judgment was entered during the period respondent was studying law preparatory to taking the examination for license. Rule 2, 185 N. C., 787. He is now paying into the clerk's office $30.00 a month for the support of his nine-year-old child.

Is this record such as to warrant the Court in finding that the respondent, Otis W. Duke, is now of sufficient upright character to entitle him to receive license to practice law in all the courts of North Carolina? We think not.

There is strong evidence tending to support the conclusion that the respondent was quite willing for his former wife to obtain a divorce from him. According to his own affidavit, he was living with her as late as 21 April, 1924, when they separated; he then went back for a few days about a month later; suit for divorce was instituted in June or July following, and the divorce obtained at the August Term of court thereafter. He filed no answer to her complaint charging him with adultery

and alleging that he was not a fit and suitable person to have the care and custody of his minor child. He married again within two months after the divorce.

If the protestant's present allegations be true, then a fraud was practiced on the court by the respondent. If they be not true, the judgment as it stands proclaims the respondent's infidelity and unfitness to have the care and custody of his minor child. So, taking either horn of the dilemma, this divorce proceeding with the judgment rendered therein is a stumbling block in the path of the respondent. If the record as made be not true, it is his fault for he was silent at a time when it was his duty to speak. But the proceeding itself imports verity. Therefore the respondent is face to face with a record, made as a result of his own wrongdoing, which negatives the conclusion that he now possesses the necessary upright character required of successful applicants for license to practice law in North Carolina.

Application denied.

CALKINS DREDGING COMPANY, INC., v. THE STATE OF NORTH CAROLINA, THE FISHERIES COMMISSION OF NORTH CAROLINA, AND THE FISHERIES COMMISSION BOARD OF NORTH CAROLINA.

(Filed 24 February, 1926.)

1. Government — Claims Against State — Recommendatory Powers of Supreme Court—Constitutional Law.

The original jurisdiction given the Supreme Court to pass upon claims against the State or its subordinate agencies of government, which are not subject to suit or execution under judgment, are recommendatory to the Legislature only, as to the matters of law involved upon facts agreed to, or made to appear, and this Court does not pass upon conflicting evidence to determine the facts at issue. Const., Art. IV, sec. 9.

2. Same—Original Jurisdiction.

The powers given the Supreme Court of the State to recommend to the Legislature the payment of claims against the State is original and exclusive.

3. Government—Suits—Actions.

Neither the State nor its subordinate agencies of government may be subject to suits or actions against it or them in its own courts or the courts of other states.

4. Government — Claims Against State — Recommendation of Supreme Court—Questions of Law.

The Supreme Court will not recommend to the Legislature the payment of a claim against the State, when no questions of law are involved, or when such questions are resolved against the claimant.

MRS. D. A. THOMAS ET AL. v. A. P. MORRIS ET AL.

(Filed 14 October, 1925.)

1. Waters—Easements—Condemnation—Statutes—Ponding Water.

Where the lower proprietor has dammed a stream on his own land, and has ponded the water back upon the lands of the upper proprietor under license of the common source of title to use the dam for a public mill, and the license has been later revoked and an easement has thereafter been obtained under judgment of the court in pursuance of C. S., 2555, the easement so acquired is only for the purpose of the use of the mill as stated, C. S., 2531, and does not extend to the exclusive use of water upon the lands of the upper proprietor for fishing and seining.

2. Same—Limitation of Actions.

Where the lower proprietor has acquired an easement in the lands of the upper proprietor to pond water back thereon from a dam erected on his own land to operate a public mill, the exercise of this right under the easement does not affect the title to the submerged land of the upper proprietor or subject the upper proprietor to an action for damages that will start the running of the statute of limitations, nor will this use of the water ponded on the land of the upper proprietor by the lower proprietor for fishing with hook and seine ripen into his exclusive use for these purposes.

3. Instructions—Evidence.

Where the entire evidence is in defendant's favor and admits of but one inference, it is correct for the trial judge to instruct the jury that if they believe the evidence to answer the issue in his favor.

APPEAL by defendants from *Barnhill, J.*, at September Term, 1924, of LEE.

Action to remove cloud upon title, and for restraining order permanently enjoining defendants from entering upon lands described in the complaint or from further trespassing thereon. Defendants, in their answer, disclaim title to that portion of the land described in the complaint which is not covered by the water of Morris Mill Pond; as to the remainder, which is covered by said waters, they allege that they are the owners and in possession thereof. Defendants plead and rely upon the 30 years and 20 years statute of limitations, and upon the judgment in an action between ancestors in title of both plaintiffs and defendants.

The land in dispute is and has been for more than 30 years covered by water, backed upon it by a dam across Juniper Creek, located below the land. This dam was erected and is maintained in order to procure water power for the operation of a saw mill and a grist mill. The land in dispute, with the water backed and covering the same, is the upper part of Morris Mill Pond. There is evidence that defendants

are the owners and in possession of the dam, the saw mill and grist mill, and the lower part of the Morris Mill Pond.

At the close of defendants' evidence, plaintiff caused to be entered in the record the following admission: "The plaintiffs admit that defendants have backed water on the portion of land in dispute in connection with the operation of Morris Pond a sufficient length of time to acquire, and that they had acquired an easement in the land for that purpose."

At the close of all the evidence, the following issue was submitted to the jury:

"Are the plaintiffs the owners of the land described in the complaint, free and clear of any claim or any right of the defendants to any part thereof, except an easement to back water in connection with the operations of Morris Pond?"

Upon this issue, the court instructed the jury as follows: "So, if you believe the evidence in this case, it will be your duty to answer the issue 'Yes'; if you do not, answer 'No.'" To this instruction defendants excepted, and assign same as error.

The jury having answered the issue "Yes," judgment was rendered that plaintiffs are the owners of the land described in the complaint, free and clear of any claims or rights of the defendants in any part thereof, except an easement to back water thereon, in connection with the operation of the mill, and under the same conditions, with respect to the height of the water ponded, as are now maintained; the judgment includes a restraining order perpetually enjoining defendants, their servants and agents from committing any acts of trespass on the land, or asserting any dominion or control over the same, except in the exercise of their rights under the easement. To this judgment defendants excepted. They appealed to the Supreme Court, assigning errors based upon exceptions taken during the progress of the trial, to the admission and exclusion of evidence, to the refusal of the court to instruct the jury as requested and to instructions as given in the charge.

A. A. F. Seawell and E. L. Gavin for plaintiffs.
D. B. Teague and Hoyle & Hoyle for defendants.

CONNOR, J. There was evidence that plaintiffs and those under whom they claim are and have been in possession of the land described in the complaint, including the land in dispute, under known and visible lines and boundaries, and under colorable title, for more than seven years. A portion of this land—approximately 20 or 30 acres—is and has been for more than 30 years covered by water, and is the

upper part of Morris Mill Pond. This pond is caused by a dam, across Juniper Creek, which flows over and across the land described in the complaint. The dam was erected more than 30 years before the commencement of this action and has been since maintained continuously for the purpose of securing water power for the operation of a saw mill and grist mill, located on the banks of said creek, below the land in dispute. The water, making the pond known as Morris Mill Pond, extends continuously from the dam up the creek to, and including, the land claimed by plaintiffs. A considerable portion of the pond lies between the dam and the line dividing the land in dispute and the land which forms the lower part of said pond lying nearest the dam and the mills.

There is evidence that more than 30 years ago, M. V. Morris, father of defendants under whom they claim, owned and operated the saw mill and the grist mill. He maintained the dam for the purpose of procuring water power for the operation of said mills. He controlled the pond caused by said dam. Defendants have succeeded to the rights of M. V. Morris with respect to said dam, mills and pond.

In an action pending in the Superior Court of Moore County, entitled, "C. W. R. Thomas et al. v. M. V. Morris et al.," and tried at April Term, 1889, a verdict was rendered that the defendants in that action built the dam, then across Juniper Creek, under the license of plaintiffs in that action; that said license had been revoked prior to the commencement of the action, and that the annual damages arising from the maintenance of the dam since the commencement of the action was $7.50. Judgment was thereupon rendered that plaintiffs recover of defendants the sum of $7.50 per annum for the next five years. Plaintiffs and defendants in the instant action claim under and are privies with the plaintiffs and defendants in that action. Defendants in said action maintained the dam thereafter for five years by virtue of said judgment, and of the statute, now C. S., 2555, 2557 and 2558. At the expiration of said five years, said defendants continued to maintain said dam. This is the same dam as that now maintained by the defendants in this action. The waters of Juniper Creek have been continuously backed and ponded on the land in dispute by this dam.

M. V. Morris, and defendants, since they have succeeded to his rights with respect to said dam and the pond caused thereby, have continuously fished with hook and line and with set nets and seines in the waters of said pond, including the waters covering the land in dispute. They have given permission to others to fish and bathe in said pond, who have, under said permission, fished in the waters of said pond, including the waters covering the land in dispute. Per-

sons have, during this time, fished and bathed in the pond, without permission of defendants.

There is no evidence of other acts done by defendants, or by those under whom they claim, or by those claiming under them, tending to show possession of the land in dispute. Defendants, and those under whom they claim, by a dam erected and maintained for the operation of a saw mill and a grist mill, have ponded water on the land in dispute for more than 30 years and have from time to time continuously during said 30 years, with hook and line, with set nets and seines, fished in the waters covering the land in dispute.

There was no evidence of record title to the land in defendants; they relied upon their pleas of adverse possession for 20 and 30 years as a defense to plaintiff's action.

There was no error in the instruction that if the jury believed the evidence they should answer the issue "Yes." This assignment of error is not sustained.

Those who erected this dam, more than 30 years ago, did so under a license from the then owners of the land described in the complaint, to pond water upon their lands; this license was revoked prior to 1889; the owners of the dam continued to maintain the dam and to pond water upon the land; in an action brought by the owners of the land for damages caused by the ponding of water resulting from the maintenance of the dam across Juniper Creek, below the land, for the operation of a public mill, judgment was rendered that plaintiffs were not entitled to recover damages as alleged, but were entitled to recover annual damages, assessed by the jury, for five years. This judgment was rendered in accordance with section 1858 of The Code, now C. S., 2555.

There is no evidence that executions upon said judgment have been returned unsatisfied; therefore, the owners of the land could not, under Code, 1859, C. S., 2556, have maintained an action to have the dam abated as a nuisance. At the expiration of five years they could have maintained an action for further assessment of damages; their failure to avail themselves of this right conferred by statute for over 20 years did not affect the right of the owner of the dam to continue to maintain it for the purpose of operating a public mill, and to continue to pond water on the land as he had theretofore done. The lapse of time has barred the owner of the land of the right to recover damages, as provided by statute; it has not affected, however, either by enlarging or lessening the same, the rights of the owner of the dam. His right to pond water, by virtue of the easement, is of the same character as his right to do so, by virtue of the license, prior to 1889, and of the judgment rendered at April Term, 1889, of the Superior Court

of Moore County, during the succeeding five years. The exercise of his right to pond water upon the land has not been adverse to the true title to the land, and no title to the land adverse to the true title could be founded upon the exercise of this right, even if there had been evidence of possession as required for ripening title under the 20 or 30 years statute of limitations.

The easement acquired by defendants to pond water on the lands in dispute, admitted by plaintiffs, conferred upon them no greater rights than would have been conferred by a grant, or by a judgment in a condemnation proceeding under the statute. Nor did the exercise of rights under the easement subject defendants to an action for damages, resulting from the exercise of such rights. *Powell v. Lash*, 64 N. C., 456, 59 L. R. A., 817, and note. The very definition of an easement is inconsistent with a contention that the title to the land, subject to the easement, was or could have been affected thereby. "An easement is a liberty, privilege, or advantage, without profit which the owner of one parcel of land may have in the lands of another." 19 C. J., 862.

"The overflowing of land by an act not done on it, but by stopping a water-course below, on one's own land, is not an ouster of the owner of the land overflowed. There is no entry, which is necessary to make a disseizin. The remedy for the injury is not trespass, but an action on the case for the consequential damages. Hence, however long it may continue, it affords, of itself, only a presumption of a grant of an easement, and not of a conveyance of the land."

This principle from the opinion of *Ruffin, C. J.*, in *Green v. Harman*, 15 N. C., 161, applicable to the facts of the instant case, is cited by *Justice Allen* in *LaRoque v. Kennedy*, 156 N. C., 361, who says it is not applicable to the facts in that case. In the latter case, the dam was on the land claimed by defendant whose contention was that he was the owner of the land upon which the water was ponded, under a deed covering same.

The rule stated in *Williams v. Buchanan*, 23 N. C., 535, and approved in *Locklear v. Savage*, 159 N. C., 237, and in numerous other cases decided by this Court and cited in the brief for defendants, applied only where the possession is adverse. The water was ponded on the land in dispute by the dam, erected under a license from the owners of the land, and maintained by virtue of the judgment in the proceedings to condemn, under the statute, and continued, after the expiration of five years, until, by the lapse of time, an easement was acquired, which barred the owners of the land only of the right to recover damages resulting from ponding water on their land by the dam.

The acts of defendants and of those under whom they claim and of those who claim under them, are not evidence of possession of the land. They fished in the waters upon the land with hook and line, nets and seines. This is quite different from constructing fish traps and repairing dams on the land for the purpose of catching fish in the waters flowing over the same, which was held by *Gaston, J.*, in *Williams v. Buchanan*, 23 N. C., 536, to be acts of dominion over the land, constituting unequivocal possession of same. The contention that fishing in the waters of a mill pond subject the fishermen to an action of ejectment by the owner of the land, is novel; it is interesting if not persuasive.

The burden of the issue submitted to the jury was upon the plaintiffs; there was evidence which, if believed by the jury to be true, was sufficient to sustain the affirmative of the issue; there was no evidence to the contrary, and therefore no conflict in the evidence. No reasonable inference could have been drawn by the jury adverse to the contention of plaintiffs upon the issue.

There was no error in the instruction to the jury and the assignment of error based upon the exception to same cannot be sustained.

We have examined and considered the other assignments of error. None are prejudicial and they are not sustained.

Defendants contend that the easement to pond water upon the land in dispute, which plaintiffs admit defendants have acquired, carried with it the exclusive right to all uses of the ponded water on the land, including the exclusive right to fish and bathe therein. They therefore assign as error the restraining order included in the judgment. The right to maintain a dam, for the purpose of procuring water power for the operation of a public mill, C. S., 2531, and for that purpose to pond water upon the lands of another situate on the stream above the dam, is founded upon the right of eminent domain. It ought, therefore, to be limited strictly to the accomplishment of the purpose for which it is granted, conferred, or acquired. It carries with it all rights incident to the principal right; the owner of the mill may use the water for every purpose incident to the purpose for which the right to pond the water is recognized; but these incidental rights ought not to be unduly extended by construction. The right to fish or bathe in a mill pond has no connection with the right to use the water for purposes of power. It is not incidental to the principal right, nor does the principal right, under the easement, carry with it the right to fish or bathe in the water ponded upon the lands of another. The contention is not well founded, and there was no error in the judgment in the respect complained of.

We have examined with care authorities cited in the brief of defendants to sustain their contention that as the owners of the easement to pond water upon plaintiff's land, they have the exclusive right to fish and bathe therein. The authorities do not sustain the contention. It is said in *Turner v. Hebron,* 61 Conn., 175, 14 L. R. A., 386, "Prima facie, the right to take fish in any water other than navigable rivers, belongs to the owner of the soil over which the water flows. Whenever the ownership of water is in one person and the ownership of the soil under the water is in another, the right of fishing in the water belongs to the former." Defendants, however, have not acquired ownership of the water which flowed naturally through Juniper Creek, over plaintiff's land. They have acquired and own only the right to impede the water when it reaches the dam on their land, and thus to pond same on plaintiff's land. Their rights under the easement are confirmed by the judgment. With this they must be content. There is

No error.

NOLAND COMPANY, INC., v. A. F. HESTER AND W. H. McELWEE, TRADING AS HESTER & McELWEE, BOARD OF TRUSTEES OF SOUTHERN PINES SCHOOL, AND A. S. RUGGLES, P. P. PELTON, J. S. MILLIKEN, R. L. CHANDLER, J. F. COLE, MRS. REBECCA SWETT AND M. Y. POE.

(Filed 14 October, 1925.)

1. Mechanics' Lien—Liens—Statutes.

The rights of laborers and materialmen to acquire liens against the property of the owner for work done upon, and material furnished to the contractor in the erection of his building, etc., do not rest by common law but strictly by statute, and the provisions of the statute must be followed for its enforcement; and where the property is not subject to this lien no duty or obligation is imposed upon the owner in respect to such claimants.

2. Schools—Municipal Corporations—Liability of Official Boards and Individual Members—Mechanics' Liens—Liens.

The failure of a school committee to require of the contractor a bond as provided for by C. S., 2445, is expressly made by the statute a misdemeanor on the part of the individual members, and no civil liability for such failure attaches either to the school district or to the individual trustees, but only by indictment against the individuals composing the board.

APPEALS by plaintiff and defendants from *Cranmer, J.,* at April Term, 1925, of WAYNE.

Civil action heard upon the following agreed facts:

1. On the 29th day of July, 1922, the Board of Trustees of Southern Pines Schools entered into a contract with Hester & McElwee for the alteration of a school building at the price of $55,048.00. At the time A. S. Ruggles, P. P. Pelton, J. S. Milliken, Mrs. Rebecca Swett, and M. Y. Poe constituted said board of trustees.

2. Said board of trustees failed to require the defendants, Hester & McElwee, to furnish a bond as provided by section 2445 of the Consolidated Statutes. In failing to require said bond, the said board and the individual members thereof were acting on the advice of Amar Embury, an architect, who advised them that the work could be easily done for the amount of the bid and that the purchase of a bond would be a useless expense to the board.

3. Of the materials used in said work by Hester & McElwee, Noland Company, Inc., (under an agreement with Hester & McElwee) furnished materials of the value of $6,073.85, the first of said materials being furnished on 17 August, 1922, and the last of said materials being furnished on 21 May, 1923. At the time said materials were furnished said Noland Company, Inc., thought that a bond had been required in accordance with C. S., 2445, never having been advised to the contrary by the board of trustees or the individual members thereof. The sum of $2,848.99 has been paid to Noland Company, Inc., for said materials; and there is now due to Noland Company, Inc., therefor, the sum of $3,224.86, with interest from 27 September, 1923.

4. Within a few days after said materials were furnished by Noland Company, Inc., the board of trustees learned that Hester & McElwee were behind in their payments to the subcontractors and materialmen on said job; and thereupon the said trustees required the said Hester & McElwee to furnish a statement of all outstanding accounts due by them for materials and labor furnished on said job. Thereupon the said Hester & McElwee furnished said trustees statements of all outstanding accounts due by Hester & McElwee for materials and labor on said job, including among said statements an itemized statement of the indebtedness due Noland Company, Inc. Upon receiving these statements the trustees paid to Hester & McElwee under their contract a sufficient sum to pay off all outstanding indebtedness, including the entire amount due Noland Company, Inc. The said Hester & McElwee, however, applied none of said funds to the payment of the amount due Noland Company, Inc., and after the completion of said building the board of trustees did not have a sufficient sum under said contract to reduce the amount due Noland Company, Inc., below the said sum of $3,224.86.

Plaintiff sues to recover the balance of its account, and seeks to hold the defendant, board of trustees, in its official capacity, as well as the members thereof individually, liable therefor.

His Honor entered judgment against the defendant, board of trustees, in its official capacity, for the balance of plaintiff's claim, and declined to hold the members of the defendant board liable as individuals.

Both sides appeal, assigning errors.

Kenneth C. Royall and Ballard S. Gay for plaintiff.
Johnson & Johnson and U. L. Spence for defendants.

PLAINTIFF'S APPEAL.

STACY, C. J. The plaintiff's appeal presents but a single question for decision. It is this: Does the failure to exact from the contractors a bond, as required by C. S., 2445, render the individual members of the defendant board of trustees civilly liable for any part of plaintiff's uncollected claim? Under the express terms of the statute and in the light of the better-considered decisions on the subject, we think this question must be answered in the negative. Such was the direct holding in *Fore v. Feimster,* 171 N. C., 551.

For the sake of clearness, it may be well to observe that the law in regard to liens, in so far as it relates to materialmen, is statutory, and not a creature or development of equity jurisprudence. "The 'material lien' is by virtue of the statute only." *Broyhill v. Gaither,* 119 N. C., 443. The principles of equity, therefore, should not be confused with the provisions of the statutes bearing on the subject. Liens are given to subcontractors and those who furnish labor, materials and supplies, to the end that they may effect collections from their debtors, the original contractors, and not for the purpose of rendering the owners primarily liable for such claims. *Rose v. Davis,* 188 N. C., 355.

The statutes enacted to secure the payment of these claims, and which have been amended from time to time in an effort to remedy defects found in the existing laws, have been construed by us in a number of cases and their operation confined to buildings other than those erected for a public use. It is the uniform holding that no lien can be secured or enforced against a public building. *Warner v. Halyburton,* 187 N. C., 414 (public school building); *Ingold v. Hickory,* 178 N. C., 614 (public school building); *Scheflow v. Pierce,* 176 N. C., 91 (sewer system, town of Tarboro); *Hutchinson v. Comrs.,* 172 N. C., 844 (county home); *McCausland v. Const. Co.,* 172 N. C., 708 (public school building); *Fore v. Feimster,* 171 N. C., 551 (county home); *Hdw. Co.*

v. Graded School, 150 N. C., 680; *S. c.,* 151 N. C., 507 (public school building); *Gastonia v. Engineering Co.,* 131 N. C., 359 (municipal electric-lighting plant and waterworks pumping station); *Snow v. Comrs.,* 112 N. C., 336 (court house).

The lien laws, therefore, may be put aside as inapplicable to the instant case, being, as it is, an action to recover for materials furnished in the construction of a public school building. Where the property is not subject to a lien, as here, no duty or obligation is imposed upon the owner by virtue of any notice or attempt to acquire a lien thereon. *Foundry Co. v. Aluminum Co.,* 172 N. C., p. 707. No doubt the failure to hold this circumstance clearly in mind led to an inexact dictum in *Scheflow v. Pierce,* 176 N. C., p. 93; and it is possible that similar expressions may be found in other cases.

In *Hutchinson v. Comrs.,* 172 N. C., 844, the Board of Commissioners of Iredell County, upon notice duly received, paid to a subcontractor (Lon G. Cruse Company) its claim for painting a county home out of funds retained and due the original contractor at the time of notice given. In a suit by the receiver of the original contractor against the board of commissioners to recover the balance due under the contract it was held that, as the subcontractor acquired no lien on the property, and the notice given by it imposed no obligation upon the owner with reference to the amount due the original contractor, such payment was made by the defendant, board of commissioners, upon its own motion, when under no duty to do so, and that the amount so paid could not be allowed as a credit against the balance due the original contractor.

Nor is it a case of common-law origin with additional and elective remedies added by statute. No such right in favor of the material men existed at common law. All their rights and remedies against the owner are statutory; hence we must look to the legislation on the subject in order to ascertain the standard by which the rights of the parties are to be determined. *Mfg. Co. v. Andrews,* 165 N. C., 285.

As a substitute for the remedies afforded by the lien statutes, where other than public buildings are built, rebuilt, repaired or improved, and in an effort to place public construction somewhat on a parity with private work of a similar kind, the Legislature provided in C. S., 2445, that every county, city, town or other municipal corporation, which lets a contract for building, repairing or altering any building, public road or street, shall require the contractor of such work (when the contract price exceeds $500.00) to execute a bond, with one or more solvent sureties, before beginning any work under the contract, payable to said county, city, town or other municipal corporation, and conditioned for the payment of all labor done or materials and supplies

furnished on said work, and upon which suit may be brought for the benefit of the laborers and materialmen having claims. *Warner v. Halyburton, supra.* It is further provided that, if the officials of any county, city, town or other municipal corporation, fail to require such bond, they shall be guilty of a misdemeanor.

It was assumed on the hearing and argument that a public school board, such as the one here sued, comes within the purview of this statute, and that the defendant board, under the terms of said statute, was in duty bound to exact a bond from the contractors or suffer the penalties imposed by law for the failure to perform such duty. We shall treat the case on the same basis, following, in this respect, the precedent set by *Warner v. Halyburton,* 187 N. C., 414.

It is conceded that the defendant, board of trustees, acting on the advice of the architect, did not require a bond of the contractors, and that this is in direct violation of the statute. Such failure is denominated a misdemeanor, and accordingly the members of the board are liable to indictment therefor.

It will be observed that the law imposes no individual duty upon the defendants to exact a bond from the contractors, but this obligation is laid upon the "county, city, town or other municipal corporation," when it, in its corporate capacity, enters into a contract for the erection of a public building or other public construction. The coercive features of the statute are directed against the officials whose duty it is to take the bond, and who fail to do so. The only penalty prescribed for such failure, however, is liability to criminal indictment. Summing up the result of the decisions in other jurisdictions on similar statutes, and adopting the same as a correct interpretation of our own law, it was said in *Fore v. Feimster, supra,* "that where an act of the Legislature, in reference to a corporate body in its terms imposes a corporate duty, the individuals, as such, composing the corporation or charged with the general management and control of its corporate affairs shall not be held to personal liability unless expressly made so by the statute itself, or unless they have been charged with or have undertaken some individual or personal duty concerning the matter." There is no contention that the present defendants have undertaken any individual or personal duty concerning the matter here in controversy, nor is there any allegation of wilful misconduct on their part.

This being the correct interpretation of the statute now under consideration, we must hold that it was not error for the court to decline to render judgment against the defendants individually.

True, in a number of cases, notably *Hipp v. Farrell,* 169 N. C., 551; *S. c.,* 173 N. C., 167, it was said, in substance, that one who holds

a public office, administrative in character, and in reference to an act clearly ministerial, may be held individually liable in a civil action, to the extent of any special damages sustained by reason of his failure to perform his official duties; and in *Holt v. McLean,* 75 N. C., 347, there is a dictum to the effect that, under such conditions, he may also be liable criminally to the public. But these decisions were made in reference to other statutes, and they are not controlling here. The fact that the General Assembly has imposed personal liability in some cases and failed to do so in others is equivalent to a legislative declaration that, in the latter instances, individual liability is not to attach. *Expressio unius est exclusio alterius. Fore v. Feimster,* 171 N. C., p. 555, and cases there cited.

The plaintiff's exception, therefore, cannot be sustained; and no error has been made to appear so far as its appeal is concerned.

Affirmed.

DEFENDANTS' APPEAL.

STACY, C. J. The appeal of the defendants also presents but a single question for decision: Does the failure to exact from the contractors a bond, as required by C. S., 2445, render the defendant, board of trustees, in its official capacity, civilly liable for any part of plaintiff's uncollected claim? This precise question was before the Court in *Warner v. Halyburton,* 187 N. C., 414, and decided in the negative. *Mr. Justice Hoke* (later *Chief Justice*), speaking for the Court, said: "In so far as the liability of the board of education, as such, is concerned, this statute, as it does, imposing a new duty and providing for its enforcement by indictment, on authority this remedy, and none other, must be pursued, and no civil liability will attach to them officially."

The defendants' exception, therefore, must be sustained. It was error to render judgment against the defendant, board of trustees, in its official capacity.

In answer to the plaintiff's argument that the conclusions here reached leave the laborers and materialmen without adequate protection against officials defaulting in their duty, it is sufficient to say that criminal indictment is the only remedy prescribed by the statute, and we must declare the law as we find it. The Legislature alone may change it, if it is thought to be inadequate. Plaintiff's rights and remedies against the defendant board and its members are statutory, and the courts are not at liberty to extend a penal statute, or one of this kind, beyond the clear meaning of its terms. "The legislative intent must be the controlling spirit in the construction and application of statutes of this nature."—*Varser, J.,* in *Finance Co. v. Hendry,* 189 N. C., p. 554. Then, too, it should be remembered, the plaintiff furnished

materials to the contractors without knowing, or without making any inquiry, as to whether a bond had been given or exacted in accordance with the provisions of the statute. It is the duty of those who accept public office to obey the law, not to disregard it, and they are liable, according to the penalty prescribed, for their failure to do so; but, in the instant case, the plaintiff could easily have ascertained by inquiry as to whether the bond had been given or exacted, and it is presumed to have known that criminal indictment of the members of the defendant, board of trustees, was the only penalty named for the failure of the corporation to exact such bond.

Error.

CEDRIC RIGGS, BY HIS NEXT FRIEND, M. C. RIGGS, v. EMPIRE MANUFACTURING CO.

(Filed 14 October, 1925.)

1. Employer and Employee—Master and Servant—Negligence—Safe Place to Work.

The duty of an employer in the exercise of reasonable care to furnish to his employee a reasonably safe place to work in the course of employment, is nondelegable, and he may not escape liability when a negligent personal injury has been inflicted on an employee by another having charge of the work.

2. Same—Dangerous Employment—Warning of Danger.

Where the duty of an employee is to make a clearing or passway in the woods for others who are felling trees therein, and upon the falling of a nearby tree he seeks to escape injury by fleeing, and falls and injures himself by being cut with an axe or bush-hook he had been using: *Held*, under the circumstances it was evidence of the employer's negligence, that he had failed to give the injured employee timely warning of his danger is within the rule requiring the employer to furnish his employee a reasonably safe place to work, and sufficient to take the case to the jury upon the issue of negligence.

3. Same—Insurer.

The liability of an insurer does not come within the rule requiring the employer to furnish his employee a safe place to work, for he is only to exercise such reasonable care under existing conditions to provide such place and supply him machinery, implements and appliances suitable for the work in which he was engaged, and to keep them in safe condition by the exercise of proper care and supervision.

4. Same—Contributory Negligence—Burden of Proof.

Where contributory negligence is pleaded with supporting evidence in a negligent personal injury case, and tends to show that plaintiff received the injury complained of while in imminent peril, the burden is on defendant to show that under the existing circumstances the plaintiff

had acted in disregard to his own safety, and it is not required of him that he should have selected the less dangerous way to have escaped the injury.

5. Instructions—Disjunctive Parts—Appeal and Error.

Upon exception to and appeal from the charge of the court, his instructions will not be regarded in disjunctive fragments, but construed with the other relative portions thereof.

APPEAL from *Barnhill, J.*, and a jury, Spring Term, 1925, of PAMLICO.

The contentions on the part of plaintiff were: That Cedric was an inexperienced boy, 17 years of age, and was employed by the defendant's foreman, E. A. (Gene) Whitford, to take a bush-hook and axe and go in the woods and help one Frank Fulcher clear roads for the hauling. The defendant had several men sawing trees, hauling and snaking logs in close proximity to where he was clearing the road. The foreman was present in charge of and directing the work being done. Tops of trees and logs were lying around where Riggs was put to clear the road. While he was at work chopping bushes and limbs and throwing them out of the way, he heard the workmen back of him, who were cutting, "they just hollered." When they hollered he did not look around, but jumped out of the way and ran. He heard the tree cracking. He was about 35 or 40 feet from the tree and it fell in the direction of where he was working. The tree was about 62 or 64 feet high. That he ran to keep from getting killed and the tree would have fallen on him if he had not run. While he was getting out of the way of the falling tree, jumping over tops and debris, he stumbled over a limb and in falling was injured by being cut by the axe.

Defendant denies it was guilty of any negligence and pleads contributory negligence on the part of plaintiff. It admits that Whitford was foreman but contends: (1) That Cedric Riggs, the plaintiff, was an experienced boy and when he got hurt was not within 150 or 200 feet of the nearest tree falling, which was on the opposite side of the team. No tree was over 75 feet long and where he was working and got hurt was out of the range of the falling tree. (2) That he was walking on a log and slipped off and was hurt in that way.

The issues submitted to the jury and their answers thereto, were as follows:

"1. Was the plaintiff, Cedric Riggs, injured by the negligence of the defendant, as alleged in his complaint? Answer: Yes.

2. If so, did said plaintiff, by his own negligence, contribute to his own injury, as alleged in the answer? Answer: No.

3. What damage, if any, is said plaintiff entitled to recover from defendant? Answer: $700.00."

Judgment was rendered on the verdict. Many exceptions and assignments of error were made by defendant as to the competency of evidence, charge of the court, etc., and defendant appealed to the Supreme Court. The material ones we will consider in the opinion.

D. L. Ward and F. C. Brinson for plaintiff.
Z. V. Rawls and Ward & Ward for defendant.

CLARKSON, J. It is well settled in this State "that an employer of labor, in the exercise of reasonable care, must provide for his employees a safe place to do their work and supply them with machinery, implements and appliances safe and suitable for the work in which they are engaged, and to keep such implements, etc., in safe condition as far as this can be done by the exercise of proper care and supervision. *Pigford v. R. R.,* 160 N. C., 93; *Young v. Fiber Co.,* 159 N. C., 376; *Alley v. Pipe Co.,* 159 N. C., 327; *Patterson v. Nichols,* 157 N. C., 406; *Mercer v. R. R.,* 154 N. C., 399"; *McAtee v. Mfg. Co.,* 166 N. C., 456; *Holt v. Mfg. Co.,* 177 N. C., 178; *Beck v. Tanning Co.,* 179 N. C., 125; *Cook v. Mfg. Co.,* 183 N. C., 56; *Gaither v. Clement,* 183 N. C., 456.

It will be noted that it is the duty of the master to "use or exercise reasonable care," or "use or exercise ordinary care" to provide the servant a reasonably safe and suitable place in which to do his work. The master is not an insurer. The failure to submit in a charge the qualification of this duty is error, and new trials have been frequently granted on account of the omission. It is a substantial right. The most recent case granting a new trial is *Cable v. Lumber Co.,* 189 N. C., p. 840. In the present case the court below did not fall into this error. The part of the charge complained of by defendant is as follows: "If the jury find by the greater weight of the evidence, with the burden on the plaintiff, that the plaintiff was employed by the defendant to work for wages in its timber woods under the direction of one Gene Whitford, who was his foreman or boss, and from whom he was required to take orders, and should find that he was ordered by said Whitford to take an axe and bush-hook and help in cutting out a path or road for the defendant's haulers near the timber trees which were being cut down by defendant's employees within such proximity as to be in danger from falling trees, and that while he was so engaged one of the trees which the defendant's agent had sawed, fell in his direction and so close to him that he was compelled to run to keep the tree from falling on him and killing or disabling him, and while attempting to get out of the way of the falling tree, he fell on the axe which he had in his hand for cutting out the road and was injured as alleged by him, and should further find that the defendant did not use ordinary care to furnish

to the plaintiff a reasonably safe place in which to work and such failure was the proximate cause of the plaintiff's injury, if you find he was injured, you will answer the first issue Yes."

We think the charge on the facts and circumstances of this case correct.

In *Lucey v. Stack-Gibbs Lumber Co.*, 23 Idaho, 628, 46 L. R. A. (1903), p. 92, *Sullivan, J.*, said: "If it requires warning and signals to protect a servant from injury from falling trees cut by other servants, it is the master's duty to see to it that the proper signals are given, and, if the injury is caused by the failure to give the signals, the master is liable. His ability or responsibility extends beyond the selection of a servant or agent to give the signals, and includes the signal itself, and, if the servant neglects to give it, the master must answer for such negligence, as the authority to a servant to give a signal is nondelegable, and the failure to give it is imputed to the master, and the servant employed to give it is not the fellow-servant of the injured employee so far as the giving or failure to give the signal is concerned. The master cannot instruct a servant to do or perform a nondelegable or nonassignable duty, and escape liability if the servant neglects to perform such duty, in case injury results to the employee."

In *Beck v. Tanning Co., supra, Walker J.*, said: "It is unquestionably the duty of the master to use proper care in providing a reasonably safe place where the servant may do his work, and reasonably safe machinery, implements, and so forth, with which to do the work assigned to him (*West v. Tanning Co.*, 154 N. C., 44), and this duty is a primary, and an absolute one, which he cannot delegate to another without, at the same time, incurring the risk of himself becoming liable for the neglect of his agent, so entrusted with the performance of this duty which belongs to the master, for in such a case, the negligence of the agent, or fellow-servant, if he is appointed to act for the master, is the latter's neglect also," citing numerous authorities. *Parker v. Mfg. Co.*, 189 N. C., 275; *Torrance v. Lawrence*, 189 N. C., 521; *Beck v. Chair Co.*, 188 N. C., 743.

The warning must not only be given, but it must be a timely warning—proper warning. Such reasonable time so that workmen can avoid injury. We think these matters were fairly presented to the jury.

The following is complained of by defendant in the charge: "It is the duty of the plaintiff in sudden peril, to take active measures to preserve himself from impending harm, but was by no means held to the same judgment and activity under all circumstances."

But the charge on this aspect must not be taken disjunctively, but as a whole, as follows: "On the second issue the burden is on the defendant to satisfy the jury by the greater weight of the evidence that

the plaintiff, notwithstanding the negligence of the defendant, if you find the defendant was negligent, did not use ordinary care to prevent his injury. The court charges you it is the duty of the plaintiff in sudden peril to take active measures to preserve himself from impending harm but was by no means held to the same judgment and activity under all circumstances. The opportunity to think and act must be taken into consideration. And although he may not have taken the safest course or acted with the best judgment, or greatest prudence, he can recover for injuries sustained upon showing that he was required to act suddenly without opportunity for deliberation. It has been said that when choice of evils only is all that is left to a man he is not to be blamed if he chooses one, nor if he chooses the greater, if he is in circumstances of difficulty or danger at the time and compelled to decide hurriedly." We see no error in this charge.

3 Labatt's Master and Servant (2 ed.), p. 3555, says: "It is well settled that a servant who is suddenly exposed to great and imminent danger is not expected to act with that degree of prudence which would otherwise be obligatory. Or, as the doctrine is also expressed, a servant is not necessarily chargeable with negligence because he failed to select the best means of escape in an emergency." The court below charged almost the exact language quoted in *Parker v. R. R.*, 181 N. C., p. 103. We can find no prejudicial or reversible error in the charge of the court on damages; in the exceptions and assignments of error as to the admission of evidence; refusal to nonsuit or prayers for instructions.

The case was one mainly of disputed facts, and the jury has found with the plaintiff. On the record, we find

No error.

J. R. JONES, JR., BANK OF SANFORD AND PAGE TRUST COMPANY v. J. A. CURRIE AND L. C. ROSSER, SHERIFF OF LEE COUNTY.

(Filed 14 October, 1925.)

Liens—Judgments—Transcripts—Docketing—Cross Index.

Where the transcript of a judgment recovered in H. County is sent to L. County for docketing, the transcript must not only be docketed but must be entered on the cross-index, giving the names of all the judgment debtors and the name of at least one plaintiff. C. S., 613, 614.

APPEAL by plaintiffs from a judgment of *Devin, J.*, made at July Term, 1925, of LEE, declaring the judgment hereinafter set out a valid lien on a tract of land conveyed to Carey L. Stephens. The facts agreed are as follows:

1. That a judgment was duly rendered in the Superior Court of Hoke County, at Raeford, N. C., on the 12th day of September, 1921, in favor of J. A. Currie and against Carey L. Stephens for the sum of two hundred twenty and 50/100 dollars, with interest thereon from the 25th of April, 1920, until paid, and for the costs of this action, and duly docketed in said court.

2. That on the 15th day of September, 1921, a transcript of said judgment was made to the clerk of the Superior Court of Lee County, reading on the face thereof in words and figures, as follows: "Transcript of Judgment from the Judgment Docket of Hoke Superior Court.

Hoke County. In the Superior Court.

Transcript of Judgment.

J. A. Currie, plaintiff,

v.

Carey L. Stephens, defendant.

At a Superior Court held for the County of Hoke, at the courthouse in Raeford, N. C., on the 12th day of September, 1921, before his Honor, Wm. L. Poole, clerk Superior Court, judgment was rendered in favor of J. A. Currie, the above-named plaintiff, against Carey L. Stephens, the defendant, for the sum of two hundred twenty and 50/100 dollars, with interest on two hundred twenty and 50/100 dollars from the 25th day of April, 1920, till paid, and cost of suit, $6.00.

Hoke County, ss.

I, Wm. L. Poole, clerk of the Superior Court, do hereby certify that the foregoing is a true and perfect transcript from the Judgment Docket in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at office in Raeford, N. C., the 15th day of September, 1921.

(C. S. C. Seal)

WILLIAM L. POOLE,
Clerk Superior Court.

3. That said transcript, on the outside or back thereof, read as follows:

No. 1105. From Hoke County.

Transcript of Judgment.

J. A. Quick, plaintiff

v.

Carey L. Stephens, defendant.

4. That said transcript was duly received by the clerk of the Superior Court of Lee County, and entered on judgment docket No. 3, page 209, of Lee County, the docket entry reading as follows:

No. 1523.

J. A. Quick v. Carey L. Stephens.

Transcript of judgment from Hoke County. Judgment that the plaintiff recover of the defendant the sum of $220.50, interest from 25 April, 1920, costs $6.00.

Received, filed and docketed 16 September, 1921.

5. That said judgment was entered on the cross-index of judgments of defendants on page 33 of the S's, as follows:

No. 1523.

Defendant: Carey L. Stephens; plaintiff: J. A. Quick; Book, 3; Page, 209; Year, 1921.

And entered on cross-index of plaintiffs of the Q's as follows:

No. 1523.

Plaintiff: J. A. Quick; defendant: Carey L. Stephens; Book, 3; Page, 209; Year, 1921.

6. That the said transcript was duly filed in its proper place among the judgment rolls in the clerk's office of Lee County, and has remained there since said filing.

7. That at the time said entries were made in the records of Lee County, the said judgment debtor, Carey L. Stephens, owned a tract of 125 acres of land in Lee County, fully described in paragraph 2 of the complaint in this action.

8. That more than a year after said judgment was entered in Lee County, said judgment debtor, Carey L. Stephens, conveyed said tract of land to J. R. Jones, Jr., plaintiff as trustee for his coplaintiff, Page Trust Company.

9. That on the 3rd day of November, 1922, the Page Trust Company executed and delivered to Carey L. Stephens a paper-writing reading as follows:

"To Carey L. Stephens, of Hoke County, Raeford, N. C., Page Trust Company assumes and guarantees Carey L. Stephens against any loss arising by reason of judgment of J. A. Quick or J. A. Currie against C. L. Stephens, being judgment No. 1523 in the clerk's office of Lee County. This 3 November, 1922.

PAGE TRUST COMPANY,
By E. R. Buchan, *Cashier.*"

10. That said judgment in favor of J. A. Currie or J. A. Quick and against Carey L. Stephens, as herein set out, is unpaid.

11. That thereafter the defendant in this cause, J. A. Currie, caused execution to be issued on said judgment in his own name as plaintiff, and delivered to the sheriff of Lee County to be levied upon the lands described in the complaint, demanding that said lands be sold thereunder; and plaintiff brought this action to restrain and enjoin the said defendant and said sheriff therefrom."

Judgment was rendered in favor of the defendants as above stated, from which the plaintiffs appealed.

A. A. F. Seawell for plaintiffs.
D. B. Teague for defendants.

ADAMS, J. It is provided by statute that any judgment of the Superior Court affecting the right to real property or requiring in whole or in part the payment of money shall be entered by the clerk on the judgment docket, and that it may be docketed on the judgment docket of the Superior Court of any other county upon filing with the clerk thereof a transcript of the original. Such judgment when docketed becomes a lien for a stated period upon the debtor's real property. The entry must contain the names of the parties, the relief granted, the date of the judgment, the date of the docketing; and the clerk shall keep a cross-index of the whole, with the dates and numbers thereof. C. S., 613, 614.

The object of docketing a judgment is to secure a lien, for in the absence of an execution and levy no lien is acquired until the judgment is docketed. *Bernhardt v. Brown,* 122 N. C., 587, 593. In *Lytle v. Lytle,* 94 N. C., 683, it is said: "The docketing of a judgment is not an essential condition of its efficacy, nor a precedent requisite to an enforcement by final process. This is only necessary to create and prolong the lien thus acquired, for the benefit of the creditor against subsequent liens, encumbrances and conveyances of the same property."

The necessity of complying with these statutes has been stressed on more than one occasion. "The docketing is required, in order that third persons may have notice of the existence of the judgment lien. 'The dogget, or, as it is commonly called, the docket or docquet, is an index to the judgment, invented by the courts for their own ease and the security of purchasers, to avoid the trouble and inconvenience of turning over the rolls at large. The practice of docketing judgments seems to have obtained as early as the reign of Henry VIII. . . . Purchasers are not bound to examine for judgment liens further than to look into the proper dockets.' Freeman on Judgments, sec. 343. The

observance of this law is regarded as so important to subsequent purchasers and mortgagees that, wherever the system of docketing obtains, a very strict compliance with its provisions in every respect is required." —*Chief Justice Shepherd* in *Holman v. Miller,* 103 N. C., 119. "The requirement that a cross-index shall be kept is not merely directory—it is important and necessary. It is intended to enable any person to learn that there is a docketed judgment in favor of a certain party or parties, and against certain other parties, and where to find it on the docket. The inquirer is not required to look through the whole docket to learn if there be a judgment against a particular person—he must be able to learn from such index that there is a judgment against him, and where he can find it on the docket, its nature, purpose, etc. When there are several judgment debtors in the docketed judgment, the index should and must specify the name of each one, because the index as to one would not point to all or any one of the others. The purpose is, that the index shall point to a judgment against the particular person inquired about if there be a judgment on the docket against him. A judgment not thus fully docketed does not serve the purpose of the statute, and is not docketed in contemplation of law."—*Chief Justice Merrimon* in *Dewey v. Sugg,* 109 N. C., 329. In *Hahn v. Mosely,* 119 N. C., 73, the Court, approving the position taken in *Dewey v. Sugg.* that the names of all the judgment debtors must appear in the cross-index, said: "The docketing creates a lien, and the index and cross-index are provided to facilitate the search for such encumbrances, and hence the name of each defendant must be indexed (*Redmond v. Staton,* 116 N. C., 140), but as to the plaintiffs, it is sufficient that one name appear, since that indicates the case in which the encumbrance accrued by judgment against the specified defendant, and by turning to the judgment recorded or the judgment roll in such case the full nature and extent of the judgment will appear." See, also, *Redmond v. Staton,* 116 N. C., 140; *Shackelford v. Staton,* 117 N. C., 73; *Valentine v. Britton,* 127 N. C., 57; *Wilson v. Lumber Co.,* 131 N. C., 163; *Wilkes v. Miller,* 156 N. C., 428.

In this case the requirement of the statute as interpreted in the decisions has not been observed. Not only the name of the judgment debtor (and if more than one the names of all), must appear in the cross-index, but the name of the plaintiff also. The caption of the transcript from Hoke County is "J. A. Currie v. Carey L. Stephens," and the endorsement is "J. A. Quick v. Carey L. Stephens." The title of the judgment entered upon the docket in Lee County is "J. A. Quick v. Carey L. Stephens," and the entry, "Judgment that the plaintiff recover of the defendant," etc. While the name of J. A. Currie, the

judgment creditor, appears in the caption and in the body of the transcript from Hoke, it does not appear either in the index or in the judgment as entered upon the records in Lee.

The insufficiency of the index and docketing is the only question discussed in the briefs, and upon the record presented the exception to the judgment must be sustained.

Reversed.

B. H. B. VESTER ET AL. v. THE TOWN OF NASHVILLE.

(Filed 14 October, 1925.)

1. Appeal and Error—Injunction—Presumptions—Facts Found.

While the findings of fact by the Superior Court judge in injunction proceedings are not conclusive on appeal, there is a presumption in favor of the proceedings in the lower court, which places the burden upon the appellant to assign and show error.

2. Municipal Corporations — Cities and Towns — Taxation — Street Improvements—Assessments—Statutes.

The assessments made upon the lands of an owner adjoining a street improved by the authorities of a city or town, will not be declared invalid on the ground of the insufficiency of description in the assessment roll at the suit of such property owners, when in substantial compliance with the statute under which the proceedings were had. C. S., 2711, 2712.

3. Same—Assessment Rolls.

As between the abutting landowners upon the street improved by a city or town and the proper municipal authorities acting thereon, the failure of the latter to keep the special assessment book as provided by C. S., 2722, is not fatal to the validity of the assessments, if the original assessment roll or book is accessible, sufficient to give all necessary information of the property assessed, and available upon the statutory notice given.

4. Same—Notice—Publication—Hearings.

Where a city or town has regularly and sufficiently proceeded to assess the lands of property owners abutting a street to be improved under the provisions of our statute, and have published the notice thereof as the law requires, and such owners have been afforded ample opportunity to be heard by the commissioners of the municipality, their failure to appear and resist the assessment thus laid on their property under the proceedings prescribed by the statute will bar their right to impeach the ordinance. C. S., 2711, 2712.

APPEAL by plaintiffs from *Barnhill, J.*, dissolving a restraining order and dismissing the action.

The plaintiffs allege that the defendant paved Main and Railroad streets and without authority of law assessed against the plaintiffs their

proportionate part of the cost of the paving and curbing. They more definitely allege that the defendant failed to serve the plaintiffs with a copy of any notice relating to the improvement, that the plaintiffs have had no opportunity to comply with the order of the board of aldermen, and that the assessments against the plaintiffs were exorbitant, wrongful, and unlawful. They say further that the defendant was required to keep an assessment book, but failed to do so, that their lots have been advertised for sale to secure the payment of said assessments; and that the notice of sale is not sufficient in law. They pray judgment that the sale be enjoined until the hearing and that the assessments be vacated and set aside.

The defendant answered denying the material allegations of the complaint and alleging that the requirements of the law had been complied with. Judge Barnhill found the facts to be as follows:

(1) Pursuant to C. S., 2703 *et seq.,* petitions were filed by citizens of Nashville having property facing on Railroad Street, Barnes Street and Washington Street in said town requesting the improvement of said streets by paving the same; the said petitions were duly filed, and were signed by the required number of property owners and the secretary to the board of aldermen after investigation filed his certificate as to the sufficiency thereof.

(2) That the board of aldermen thereafter duly and properly adopted a resolution approving said petitions and authorizing said improvements, which resolution contained all matters and things required by statute, and was duly and properly published in *The Graphic,* a newspaper published in the town of Nashville.

(3) The board of aldermen of said town duly and properly made assessments against the property of persons having property abutting upon said streets, in accordance with the statute, and having ascertained the assessments prepared and filed an assessment roll which in all respects complies with the provisions of the statute in respect thereto.

(4) That upon said assessment roll having been prepared and filed, due notice was published in *The Graphic,* a newspaper published in the town of Nashville, giving notice of the hearing upon the confirmation of said assessment as provided by statute, and said hearing was duly held and said assessments confirmed. None of the plaintiffs appeared at said hearing or entered any objection or exception to said assessment, nor appealed to the Superior Court therefrom.

(5) Upon said assessment being confirmed, the board of aldermen adopted a local improvement-bond ordinance, which ordinance was in all respects duly and properly adopted, and provided that it should become effective immediately upon its adoption. This ordinance was duly and properly published in *The Graphic,* a newspaper published

in the town of Nashville, in its issue of 7 October, 1920. The proceeding of the board of aldermen in respect to the issuance of said bonds was otherwise in all respects regular and proper.

(6) The board of aldermen likewise undertook to provide and prepare an assessment book, as provided by C. S., 2722, but said assessment book does not, in certain respects, comply with the provisions of said section, in that the number of the lot or part of lots and the plan thereof is not therein given, nor is the amount of such installments and the date on which the installments of said assessment shall become due given, nor is such book indexed as required by said statute. A copy of the assessment roll was delivered to the tax collector as provided by the statute and was kept by him with the assessment book.

(7) That all of the acts of the board of aldermen in respect to the making of said improvements, the levying of said assessments, and the issuing of said bonds, were in all respects regular and proper, except as to the preparation and keeping of said assessment book.

Upon these facts it was adjudged that the failure properly to prepare and keep the assessment book does not *inter partes* affect the validity of the assessments; that the assessments are legal and constitute valid and subsisting liens upon the lots abutting the improved streets; and that the restraining order should be dissolved and the action dismissed. The plaintiffs excepted and appealed.

W. M. Person for plaintiffs.

Austin & Davenport, Finch & Vaughan and Cooley & Bone for defendant.

ADAMS, J. The plaintiffs except to the judgment on these grounds: (1) The description in the assessment roll is not sufficient; (2) the defendant failed to keep an assessment book; (3) the notice of sale is not sufficient; (4) the findings of fact are not supported by the evidence.

It is provided by statute that upon the completion of a local improvement the governing body of the city or town shall compute the total cost and make an assessment thereof, and for such purpose shall make out an assessment roll in which must be entered the names of the persons assessed, the amount assessed against them, and a brief description of the lots against which the assessment is made. Also that the assessment roll shall be deposited in the office of the clerk of the municipality for inspection by interested parties and that the governing body shall cause to be published a notice of the completion of the assessment roll, setting forth in general terms a description of the improvement and a time for the hearing of allegations and objections in respect to the special assessment. C. S., 2711, 2712.

While in cases of injunction we are not bound by the facts as determined in the trial court, there is a presumption that the proceedings below are correct and the burden is upon the appellant to assign and show error. *Sanders v. Ins. Co.,* 183 N. C., 66; *Woolen Mills v. Land Co., ibid.,* 511. The assessment roll consists of a plat or blue print of the streets on which the improvements were made, the names of the abutting property owners, the number of feet, and the amount assessed against each lot. We have examined the exhibits or addenda and are of opinion that the assessment roll was made out in substantial compliance with the provisions of the statute.

We also concur in his Honor's ruling, that, as between the plaintiffs and the defendant the defendant's failure to keep the special assessment book as provided by C. S., 2722 is not fatal to the validity of the assessments. The assessment roll and the assessment book are sufficiently definite to give all necessary information to the owners of the property against which the assessments were made.

The third exception also must be overruled. Evidently the property owners understood the notice as referring to their several lots. The question of constructive notice and the rights of innocent purchasers are not involved. And as to the fourth exception we think the evidence sustains all the findings of fact incorporated in the judgment.

The record presents a case in which the plaintiffs were duly notified and given ample opportunity to be heard; and if they saw fit not to avail themselves of the opportunity thus afforded they cannot now be heard to impeach the validity of the ordinance or the assessment. *Marion v. Pilot Mountain,* 170 N. C., 118, 123; *Schank v. Asheville,* 154 N. C., 40; *Hilliard v. Asheville,* 118 N. C., 845. The statute of limitations under the facts disclosed is not a bar.

The judgment is

Affirmed.

T. J. MURPHY ET AL v. CITY OF GREENSBORO, MURRAY CONSTRUCTION COMPANY, AND P. C. PAINTER, CITY MANAGER.

(Filed 14 October, 1925.)

1. Municipal Corporations — Cities and Towns—Suits—Taxpayers—Parties.

It is not required that a taxpayer of and property owner within a municipality first apply to the municipal authorities before seeking injunctive relief from their action affecting the taxpayer's interest, or maintain the position that the municipal corporation was the necessary party plaintiff in the suit.

2. Pleadings—Demurrer.

A demurrer to a complaint will not be sustained when the various material matters alleged separately, or any of them, construed with the legal inferences permissible therefrom, are sufficient, if established, to state a cause of action.

3. Injunction — Municipal Corporations — Cities and Towns—Streets—Bidding—Statutes.

Injunctive relief against a municipality will be available to a citizen thereof and taxpayer therein, when in a suit in behalf of himself and others so situated, he alleges that the municipal authorities accepted a bid for street paving higher than that submitted by another responsible bidder, induced thereto by personal favor. C. S., 2830.

4. Municipal Corporations—Principal and Agent—Delegated Authority—Judicial Acts—Committees.

The municipal authorities in passing upon bids for street improvements, C. S., 2830, are acting in a *quasi*-judicial capacity, and may not delegate this power to a subcommittee under an agreement to accept the report of the committee thereon as their own act, and give it validity.

5. Pleadings—Speaking Demurrer—Municipal Corporations—Cities and Towns—Charter.

A demurrer to an action that relies upon the private charter of a city (defendant) in addition to the cause of action stated in the complaint, is bad as a "speaking demurrer."

APPEAL by plaintiffs from a judgment of *McElroy, J.*, May Term, 1925, of GUILFORD, sustaining demurrers to the complaint.

The action was brought to enjoin the execution of a contract between the city and the Murray Construction Company, or, if already executed, to have it canceled and declared void.

The material allegations of the complaint may be condensed and summarized. Plaintiffs reside and have property in the city of Greensboro, which is a municipal corporation governed by a board of seven councilmen and the city manager, and the Murray Construction Company is a corporation organized under the laws of Tennessee. The city manager is active in the conduct and management of the affairs of the city, including its contracts. The governing body resolved to pave certain streets, covering a distance of six and a half linear miles, at a cost of several hundred thousand dollars. The city manager and some of the members of the city council took the position that they could award the contract for paving these streets to the Murray Construction Company without public notice or advertisement, as provided by C. S., 2830, to which other members of the council did not agree; but the mayor, councilmen and city manager were advised that it would not be lawful to award the contract without giving the statutory notice. It has been the custom to give such notice by repeated adver-

tisement in two of the city papers—such notice having been given on one or more occasions in the *Manufacturer's Record* and in papers published outside the State, for the purpose of increasing competition. On 13 March, 1925, the following notice was inserted one time in the Greensboro *Daily Record,* an afternoon paper of local circulation:

"STREET PAVING

"Proposals will be received by the city council of Greensboro, North Carolina, until 2:15 o'clock p. m., Tuesday, 24 March, 1925, for the paving and work incidental thereto on certain streets in the city of Greensboro, North Carolina. Plans and specifications may be obtained by applying to George E. Finck, Highways Engineer, City Hall, Greensboro, North Carolina.

"Each bid must be accompanied by a certified check in the sum of $7,500, made payable to the city of Greensboro, North Carolina, which will be forfeited if contract is awarded and the contractor fails to sign the contract.

"All bids shall be sealed and marked on the outside 'Bid for street paving,' addressed to P. C. Painter, City Manager, Greensboro, North Carolina.

"The bids will be opened publicly and read at the City Hall on Tuesday, 24 March, 1925, at 2:15 o'clock, p. m.

"The city reserves the right to accept or reject any or all bids.

"P. C. PAINTER, *City Manager.*"

"G. E. FINCK, *Highways Engineer.*"

On the day named for opening the bids the State Highway Commission received bids for the construction of highways to cost between one and two million dollars, and the defendants knew that many persons, firms, and corporations engaged in this work would then be in Raleigh. Lassiter & Co., a corporation organized under the laws of North Carolina, has for several years maintained an office in Greensboro and to the knowledge of the defendants has been engaged in street paving and road construction in and near the city for a number of years, having a complete paving plant and organization. On the day named in the notice Lassiter & Co. filed with the city council its sealed bid for the construction of the proposed work for $531,875, and its check for $7,500 together with a certificate from a responsible surety company that if the bid were accepted the required bond would be given. Lassiter & Co. was ready, able and willing to complete the work according to the requirements and specifications and within the time named by the defendants. The Murray Construction Company also filed

its bid, which was $566,502. This sum exceeded Lassiter's bid by $34,627. These two were the only bids. At the time designated the bids were opened and read, but the contract was not then awarded. Instead of then acting upon the bids received and passing thereon, and either accepting the lower bid of Robert G. Lassiter & Co. or rejecting both of the said bids, the said city council postponed action until the next day at 11 o'clock, pretending that it desired in the meantime to ascertain whether or not Robert G. Lassiter & Co. was in position to begin the work at once and to finish it within the time limit required, and the said city council instructed the city manager to make such investigation and report it at 11 o'clock the next morning, whereas in truth and in fact, as this plaintiff alleges on information and belief, the delay was for the purpose of devising some scheme by which the said city council could accept the bid of the Murray Construction Company and disregard the bid of Robert G. Lassiter & Co., which was the only competing bid and which would have saved a large sum of money to the taxpayers of the city of Greensboro; that the final disposition of the said bids was delayed from time to time until Monday, 30 March, 1925, and that in the meantime the Murray Construction Company was allowed to file with the said city council, or with some member thereof, a new and secret bid, which bid was not filed in accordance with the requirements of law, nor opened as provided by law; that on Monday, 30 March, as aforesaid, the said city council wrongfully and unlawfully awarded the contract to the Murray Construction Company, and thereby accepted, or attempted to accept, a bid filed and opened secretly and unlawfully and in violation of the law and in contravention of the interests and rights of the citizens and taxpayers of the city of Greensboro, and this letting to Murray Construction Company was with a full knowledge on the part of the mayor and city council that between 24 March and 30 March, 1925, tests had been made as to the sufficiency of some of the work theretofore done by Murray Construction Company and as to whether it complied with the specifications under which said work had been done, and that a number of such tests disclosed that the Murray Construction Company had not complied with its contract for said work, and that there were several streets on which the yardage, as claimed by Murray, did not check with the estimate of the city's engineers. Much of the work heretofore done by Murray Construction Company is not, to the knowledge of the mayor, city councilmen and city manager, in compliance with the city's specifications under which said work was done, and this knowledge on the part of the mayor, city councilmen and city manager was in their possession prior to 30 March, 1925. On 26 March, 1925, Lassiter & Co. wrote the city manager a letter

indicating its readiness and ability to comply with the proposed contract. Between the time of the filing and opening of the bids on 24 March, 1925, and the letting of the work to the defendant Murray Construction Company on 30 March, 1925, in some way it was arranged for the appointment of a committee of three, and that a committee of three was appointed consisting of City Manager Painter and two members of the city council to determine the award of the contract, with the agreement that all the councilmen should and would vote to let the contract for the construction of the said work as the said committee might report and recommend. Between the opening of the bids on 24 March, 1925, and the meeting of the board of city councilmen at 2:30 o'clock p. m. on 30 March, 1925, either through the committee aforesaid or at a secret meeting of members of the council of the city of Greensboro, or some of them, it was agreed to award this work to Murray Construction Company at the sum of five hundred forty-eight thousand six hundred thirty-nine dollars ($548,639), and at the meeting on Monday, 30 March, at 2:30 o'clock p. m., as aforesaid, the city councilmen, pursuant to their agreement to abide by the decision of the committee aforesaid and by way of carrying out and giving effect to the secret agreement entered into by them prior to that time in conjunction with defendant Murray Construction Company, unanimously voted to award this work to the said Murray Construction Company at the sum of five hundred forty-eight thousand six hundred thirty-nine dollars ($548,639), which was a mere formal vote made in compliance with the terms of the secret agreement referred to, thereby unlawfully accepting an entirely new bid and at a new price, wrongfully and unlawfully disregarding the sealed bids, and accepting a bid not filed in accordance with law, in that, among other things, the same was not a sealed bid nor made in compliance with law regulating such matters, and was in excess of the bid of Robert G. Lassiter & Co. in the sum of sixteen thousand seven hundred sixty-four dollars ($16,764). The cost of the construction of the work hereinbefore referred to is in the first instance paid for by the defendant city out of funds raised by taxation or otherwise, which is in part recouped by assessments against abutting property. It was the intention of P. C. Painter, city manager, and one or more of the city councilmen, to let this work to the Murray Construction Company without any notice or advertisement for bids, and at a price not less than that for which the Murray Construction Company had been doing similar work for the said city, notwithstanding the fact that recently competition among persons, firms and corporations engaged in the business of paving and highway construction had become considerably keener and the prices in consequence of such competition lower than the prices which the

said city of Greensboro had been paying to the defendant Murray Construction Company for similar work, all of which was well known to the city manager and to at least some members of the city council. P. C. Painter, city manager, was for some reason unknown to the plaintiff unduly active in his efforts to secure the award of the contract for this work to the defendant Murray Construction Company. The final award of the said contract was made upon a bid not filed in accordance with law nor publicly opened, as required by law, but was made upon a secret bid presented to the said city councilmen at a time and place other than the regular and lawful meeting, and acted upon by them at such time and place. The carrying out of the said unwarranted and illegal contract with the said Murray Construction Company by the defendant city of Greensboro will impose a considerable unlawful burden upon the taxpayers of the city of Greensboro, including the plaintiff. The moneys paid or proposed to be paid under the said contract will be derived from the taxes levied upon persons and property within the corporate limits of the said city, and this plaintiff has no relief against the unwarranted and unlawful conduct of these defendants other than by injunction, and to protect his rights and the rights of others similarly situated he has brought a suit in the Superior Court of Guilford County entitled as above. The plaintiff brings this action as a property owner in and a taxpayer of said city and in behalf of himself and all other persons similarly situated.

The grounds of the demurrers are as follows:

1. The complaint does not allege:

(a) Any action or threatened action by the city council of said city which is beyond the authority conferred by charter or otherwise; or

(b) Such a fraudulent transaction completed or contemplated by said city council as will result in injury to said city or to the interests of its citizens; or

(c) That the members of said city council, or a majority of them, in accepting the bid of defendant Murray Construction Company, referred to in the complaint, were acting for their own interest in a manner injurious to said city or to the rights of the citizens thereof; or

(d) That the city council in awarding the contract referred to in the complaint to the defendant Murray Construction Company acted corruptly or in their own individual interests or in derogation or contravention of the rights of plaintiff and other citizens of said city.

2. The complaint does not allege that prior to the institution of this action plaintiff had exhausted all means within his reach to obtain from said city council redress of the alleged grievance of which he complains, or action with reference to said contract in conformity with his wishes.

3. The complaint does not allege that prior to the institution of this action plaintiff requested or demanded of said city council that they refrain from awarding said contract to said Murray Construction Company, or that after said contract was awarded to said Murray Construction Company they declined to carry out said contract and declare it null and void.

4. The complaint does not allege that prior to the institution of this action plaintiff had first presented in writing his claim or demand to said city council in connection with the matters and things set out in the complaint, and said city council had declined to grant said claim or demand, or for ten days after such presentation had neglected to enter or cause to be entered upon its minutes its determination in regard thereto.

5. The complaint does not allege that prior to the institution of this action plaintiff had complied with the provisions and requirements of C. S., 1330.

6. The complaint does not state facts sufficient to constitute a cause of action.

The separate demurrer of the Murray Construction Company is practically the same, with these additions:

5. The complaint does not allege that prior to the institution of this action the plaintiff complied with the requirements of the charter of the city of Greensboro and presented in writing his demand to the governing body of said city with reference to the matters and things therein alleged, and that said governing body had declined to comply with said demand, or for ten days after such demand had neglected to enter or cause to be entered upon its minutes its determination with reference thereto, as by law provided.

7. It appears from the face of the complaint that the matters and things complained of were within the discretion of the governing body of the city of Greensboro.

King, Sapp & King for the plaintiffs.

B. L. Fentress, Robert Moseley, and Bynum, Hobgood & Alderman for the City and City Manager.

A. Wayland Cooke for the Murray Construction Company.

ADAMS, J. By their demurrers the defendants denounce *in limine* the plaintiffs' alleged right to maintain their suit. They assert that the cause of action existed primarily in the city and that the plaintiffs must fail because they neglected to apply to the city council to prevent or to correct the evil of which they complain—that they should have sought relief through the municipality before applying therefor to a court of equity.

When a person becomes a stockholder in a corporation he assents to the execution of all the powers which the law confers upon the corporation and agrees to abide by the action of the governing body as to all matters properly under its control. For this reason before bringing suit against the corporation to protect its rights or to redress its wrongs he must ordinarily seek remedial action through the directorate or the other controlling authorities of the corporation itself. This principle is elementary and requires only a brief citation of authority. 2 Purdy's Beach of Pri. Corporations, sec. 562 *et seq.;* Cook on Corporations, sec. 740; 14 C. J., 879; *Huntington v. Palmer,* 104 U. S., 482, 26 Law Ed., 833; *Stewart v. Steamship Co.,* 187 U. S., 466, 47 Law Ed., 261; *Merrimon v. Paving Co.,* 142 N. C., 539. As contended by the defendants, it is clearly set forth in the exhaustive opinion given in *Hawes v. Oakland,* 104 U. S., 450, 26 Law Ed., 827. But there *Mr. Justice Miller,* after discussing the general doctrine notes several exceptions in the following language: "We understand that doctrine to be that, to enable a stockholder in a corporation to sustain in a court of equity in his own name, a suit founded on a right of action existing in the corporation itself, and in which the corporation itself is the appropriate plaintiff, there must exist as the foundation of the suit:

"Some action or threatened action of the managing board of directors or trustees of the corporation, which is beyond the authority conferred on them by their charter or other source of organization;

"Or such a fraudulent transaction, completed or contemplated by the acting managers, in connection with some other party, or among themselves, or with other shareholders as will result in serious injury to the corporation, or the interests of the other shareholders;

"Or where the board of directors, or a majority of them, are acting for their own interest, in a manner destructive of the corporation itself, or of the rights of the other shareholders;

"Or where the majority of shareholders themselves are oppressively and illegally pursuing a course in the name of the corporation, which is in violation of the rights of the other shareholders, and which can only be restrained by the aid of a court of equity.

"Possibly other cases may arise in which, to prevent irremediable injury, or a total failure of justice, the Court would be justified in exercising its powers, but the foregoing may be regarded as an outline of the principles which govern this class of cases."

This general statement may be deemed broad enough to cover a pertinent exception noted by Cook: "So, also, in the state courts there are occasions when the allegation that the stockholder has requested the directors to bring suit and they have refused may be omitted, since the request itself is not required. This occurs when the

corporate management is under the control of the guilty parties. No request need then be made or alleged since the guilty parties would not comply with the request; and even if they did the court would not allow them to conduct the suit against themselves." Cook on Corporations, sec. 741. *Loomis v. Railroad,* 165 Mo., 469; *Oklahoma Co. v. Hastings,* 194 Pac., 223; *Von Arnim v. Am. Tubeworks,* 188 Mass., 515; *Sheeby v. Barry,* 89 At. (Conn.), 259.

We must not close our eyes to the fact that, as the exceptions noted in the *Hawes case* are disjunctive, the complaint must be sustained if it asserts a cause of action under either head; or to the additional fact that, as the demurrers admit relevant allegations and relevant inferences deducible therefrom, the complaint must be interpreted in the light most favorable to the plaintiffs. It therefore becomes necessary to determine whether the plaintiffs have substantially charged that the acts of the city council were *ultra vires* or indicative of the pursuit or the intention to pursue an illegal course of conduct in the name of the city in violation of the rights of the plaintiffs and other taxpayers. The complaint, it will be seen, does not charge the defendants with corruption or moral turpitude; and, indeed, this is not essential to the action. *Jones v. North Wilkesboro,* 150 N. C., 647. Constructive fraud need not originate in any actual evil design. It is sufficient in a court of equity to allege acts, omissions, or concealments which involve a breach of legal or equitable duty, trust, or confidence and tend to the injury of another or to the bringing about of an undue and unconscientious advantage. Story's Eq. Jurisprudence (Red. Ed., secs. 187, 258.)

It is provided in C. S., 2830 that no contract for construction work shall be awarded unless proposals therefor shall have been invited by advertisement once in at least one newspaper of general circulation in the city, the publication to be at least one week before the time specified for the opening of the proposals. Accepting the advertisement in question as a technical compliance with the statute we must consider the allegations concerning the subsequent conduct of the city council. It is alleged that instead of acting upon the proposals when they were opened, the council, for the purpose of devising a scheme for accepting the bid of the Murray Company and disregarding the bid of Lassiter & Co., postponed final disposition of the matter for nearly a week, meanwhile permitting the Murray Company to put in a new and secret bid, which was neither submitted nor opened in accordance with the law; and, moreover, that the city council secretly accepted a bid which contravened the interest of the plaintiffs and other taxpayers and wrongfully and unlawfully awarded the contract to the Murray Company. These admitted allegations are sufficient

prima facie to prevent a dismissal of the action, for they assert in effect a breach of trust, the failure to perform a public duty, a concealed purpose and a devised scheme to injure Lassiter & Co., to give undue advantage to the Murray Company and to wrong the plaintiffs. In any event, the council's good faith is directly assailed. *Edwards v. Berlin,* 56 Pac. (Cal.), 432; *Clark v. Comrs.,* 11 Neb., 484; *Chicago v. Mohr,* 216 Ill., 320; *Lumber Co. v. Mayor,* 99 So. (La.), 687; 2 Dillon on Municipal Corporations, sec. 811, p. 1224.

In the next place, it is alleged and admitted by the demurrers that after the bids were opened and before the contract was awarded a committee of three was appointed to determine the award under an agreement that the members of the council would let the contract as the committee should recommend. In substance this is an allegation that the councilmen attempted to abdicate their trust by a delegation of their authority. That they were acting in a fiduciary capacity seems not to have been controverted. "The principle is a plain one," says Dillon, "that the public powers or trusts devolved by law or charter upon the council or governing body, to be exercised by it when and in such manner as it shall judge best, cannot be delegated to others." Sec. 244. This principle may not prevent the delegation of duties which are ministerial; but here the trust committed to the city council involved the exercise of functions which partake of a judicial character and may not be delegated. 2 Dillon on Mun. Corp., sec. 811. Hence, we conclude that the complaint states a cause of action and that it was not necessary for the plaintiffs first to apply to the city or its council, or before bringing suit to make a formal demand, for the relief they now seek. While it is alleged the city is a municipal corporation the charter is not made a part of the complaint; and the "speaking" element of the demurrer is not to be considered. *Sandlin v. Wilmington,* 185 N. C., 257.

The judgment must be reversed and both the demurrers overruled.

Reversed.

INDIANA QUARRIES COMPANY v. ANGIER BANK & TRUST COMPANY, J. E. WILLIAMS AND P. S. COOPER.

(Filed 14 October, 1925.)

Banks and Banking — Cashier — Materialmen — Principal and Surety— Guarantor of Payment.

A cashier of a bank has only the authority to bind the bank in transactions usually within the scope of his authority as such officer, and no implied authority to guarantee in behalf of the bank the payment for

material furnished the contractor for a building in which he was personally interested, and in which the bank had no interest, though it was contemplated that a part of the building would probably be used by the bank when erected.

APPEAL by plaintiff from judgment of *Lyon, J.,* at June Special Term, 1925, of HARNETT. Affirmed.

When this action was called for trial and before any evidence was offered, defendants, J. E. Williams and P. S. Cooper, demurred, *ore tenus,* on the ground that no cause of action was stated in the complaint as to them, or either of them. Demurrer was sustained, and plaintiff excepted.

At the close of all the evidence, defendant, Angier Bank and Trust Company, renewed its motion, first made at the close of plaintiff's evidence, and then denied, for judgment as of nonsuit. This motion was allowed. Plaintiff excepted. From judgment in accordance with motion, plaintiff appealed.

Godwin & Williams for plaintiff.
Franklin T. Dupree and Chas. Ross for defendants.

CONNOR, J. In its complaint, plaintiff alleges that P. S. Cooper and J. E. Williams were President and Vice-President and Cashier, respectively, of defendant, Angier Bank and Trust Company, a corporation, engaged in the general banking business in the town of Angier, N. C.; that on 24 October, 1921, said corporation was planning and about to undertake the erection of a new building in Angier to be used partly as a bank; that P. S. Cooper, President, and J. E. Williams, Vice-President and Cashier, as officers of said corporation, were in complete charge and control of its business, and were acting for the corporation in the matter of erecting said building. It further alleges that defendants had employed M. O. Cole as "its cut stone contractor for the said building" and that said Cole had made out the specifications for the cut stone required for the said building; that defendants "sent in said order to the plaintiff, and authorized and instructed this plaintiff to ship to the defendants the amount of cut stone specified in said order, and signed a written guarantee by and for defendant bank, guaranteeing unto the plaintiff to make payment for all stone required for the bank building at Angier, N. C., according to the order placed by M. O. Cole." Plaintiff then alleges the shipment of said stone, and failure of defendants to pay for same, on demand of plaintiff.

There are no allegations in this complaint, upon which either P. S. Cooper or J. E. Williams can be held liable to plaintiff for the stone shipped by plaintiff. It is alleged specifically that they were acting as

officers of defendant, Angier Bank and Trust Co., a corporation. There was no error in sustaining the demurrer.

The evidence offered at the trial, to sustain plaintiff's action against Angier Bank and Trust Co., tends to show the following facts:

A short time prior to 24 October, 1921, plaintiff, whose place of business is in Chicago, Ill., received from M. O. Cole, of Durham, N. C., a written order for cut stone to be shipped to Angier, N. C.; before accepting said order, plaintiff sent the manager of its eastern sales office to Angier, N. C., where he saw J. E. Williams; said Williams was in charge of defendant bank as cashier. He stated to plaintiff's manager that "the bank was to have a new building"; relying upon this statement, plaintiff's manager asked Mr. Williams as cashier, to guarantee payment by Cole of the stone which Cole had ordered from plaintiff.

Thereupon, Mr. Williams signed and delivered to plaintiff's manager a letter as follows:

W. H. GREGORY, Vice-Pres. J. E. WILLIAMS, Vice-Pres. and Cashier.

"ANGIER BANK AND TRUST COMPANY,
ANGIER, NORTH CAROLINA.

P. S. COOPER, PRESIDENT,
Dunn, N. C.

OCTOBER 24, 1921.

The Indiana Quarries Company,
Chicago, Ill.

Gentlemen:

This is to certify that we will guarantee payment for all stone required for our bank at Angier, N. C., per order placed by Mr. M. O. Cole, who is our cut stone contractor on this operation. The terms are sixty days from date of invoice. Yours truly,

J. E. WILLIAMS, *Cashier.*"

Upon receipt of this letter plaintiff accepted Cole's order and shipped the stone ordered by him to Angier, N. C.; invoices were mailed to Cole dated 5 and 19 November, 1921, respectively; the total amount of these invoices was $1,238.98; no payment has been made on the account for this stone by any one, and same is now past due.

At the time the letter was signed and delivered by J. E. Williams to the manager of plaintiff, the Williams Supply Company, a corporation, was engaged in the erection of a building in Angier, N. C.; this building was planned partly as a bank; J. E. Williams, cashier, of

Angier Bank and Trust Company, was secretary of the Williams Supply Company; all the stock in said company was owned by P. S. Cooper, J. E. Williams and Mrs. J. E. Williams; the stone shipped by plaintiff, upon Cole's order, was ordered for and was used in the construction of this building; Angier Bank and Trust Company had no interest in said building or in its erection; its board of directors had not authorized J. E. Williams, cashier, to write the letter purporting to be a guarantee by the bank of payment for the stone shipped by plaintiff; it did not contemplate at the time the erection of a bank building.

Plaintiff relied upon the letter offered in evidence in good faith as the guarantee by defendant of its account against Cole for the stone; it had no notice that defendant had no interest in said building, or that Williams, its cashier, had a personal interest in the shipment of the stone.

At the close of all the evidence, the motion of defendant, Angier Bank and Trust Company, for judgment as of nonsuit was allowed. Plaintiff excepted, and assigns this as error.

If there had been evidence, from which the jury could find that plaintiff had notice, at the time it shipped the stone to Cole, at Angier, N. C., that defendant, Angier Bank and Trust Company, had no interest in the building in which the stone was to be used, and that J. E. Williams, its cashier, had a personal interest in the purchase of the stone, *Grady v. Bank,* 184 N. C., 158; *Bank v. West,* 184 N. C., 220, and *Stansell v. Payne,* 189 N. C., 647, would be conclusive of this appeal. If plaintiff had had notice of these facts before it shipped the stone, clearly the defendant, Angier Bank and Trust Company, could not be held liable upon the letter written and signed by the cashier, and purporting to be its guarantee of payment of the stone. The authority of a cashier is confined to transactions which are for the benefit of the bank. It does not extend to a transaction which is for the benefit of the cashier personally, and one dealing with him with notice that such is the character of the transaction can acquire no rights thereby against the bank, unless the transaction was actually authorized, expressly or by implication. Tiffany on Banks and Banking, p. 325.

In *Grady v. Bank, supra, Chief Justice Clark,* writing the opinion for the Court, says: "Upon all the evidence, and in the light of the above cited authorities, Grady was not an innocent party to the transaction." Grady knew that the cashier had a personal interest in the note which he alleged the cashier had taken in part payment of his note held by the bank. Although the cashier had authority to receive payments on notes held by the bank, he had no authority, as cashier, to take a note, which was virtually his own note, held by Grady for

a loan made to a corporation of which the cashier was an officer, and on which he was an endorser, in payment of Grady's note to the bank.

In *Bank v. West, supra,* the cashier of plaintiff bank had bought an automobile of defendant, who was a customer of the bank. Pursuant to the cashier's instruction, defendant drew his check on the bank for the purchase price of the automobile. This check was paid by the cashier, who, however, failed to deposit to the credit of defendant money for the payment of the check as he had agreed with West to do. The result of the transaction was an overdraft on the bank by defendant, who thereby procured the money of the bank in payment of the cashier's personal debt. It was held that the bank was entitled to recover of defendant the amount of the overdraft. It is said in the opinion that "West knew, as a matter of course, that the transaction in effect was that the cashier, without any authority from the bank, was to loan him $540 without any note or security given by him to the bank, and without payment of interest."

In *Stansell v. Payne, supra,* the plaintiff had notice that the president, who endorsed the note in the name of the bank, was acting not in the interest of the bank, but in his own interest. The president had no express authority to endorse the note in the name of the bank; we held that authority could not be implied from the mere fact that he was president of the bank.

It has been held, however, that the principle upon which these cases were decided does not apply where the party relying upon the act of the cashier had no notice of his personal interest or of the lack of interest of the bank in the transaction; nor does it apply where the act of the cashier is within his authority, expressly conferred by the bank, or where the act is ratified by the bank by receipt of benefits arising therefrom.

In *Williams v. Bank,* 188 N. C., 197, the bank was held liable for a transaction made in its name by the cashier, who applied the proceeds of the plaintiff's note to his own use, for the transaction was within the authority of the cashier, and the wrongful application was made without the knowledge of plaintiff. In *Trust Co. v. Trust Co.,* 188 N. C., 766, we held that the guaranty of a note of a customer by the cashier of the bank was binding on the bank, the cashier having no personal interest in the transaction, and the bank having received credit, with the bank relying upon the guarantee for the note thus guaranteed. In that case, the cashier had authority to discount notes owned by the bank, and the transaction was only one of many similar transactions which had been previously had between the parties, all of which had been recognized by the bank as valid and binding.

If a cashier, purporting to act for his bank, makes a contract, which he has authority to make, or which by reason of special circumstances is within the apparent scope of his authority as cashier, the bank is bound, and must be held liable. The fact that the bank receives no benefit from the contract or transaction, and that the cashier has a personal interest therein, does not relieve the bank from liability, unless the other party had notice of these facts. This principle, however, does not apply where the cashier has no authority, express or implied, to make the contract for the bank, or where the contract or transaction is not within the apparent scope of his authority. One who relies upon a contract, or transaction, made by a cashier, purporting to act therein for his bank, which is not within the apparent scope of his authority, or within his implied authority, as cashier, acts at his peril, for the bank will not be held liable unless express authority from the bank is both alleged and proved. The rigid enforcement of this well-settled principle is required for the protection, not only of stockholders, but also of depositors and the public.

There is no evidence on this record that plaintiff had notice that the defendant had no interest in the building for which the stone was ordered, or that the cashier had a personal interest therein, which would prevent liability attaching to the bank on account of the transaction, made in its name by the cashier. There is, further, no evidence that the cashier had express authority from the bank to guarantee the account of plaintiff against Cole for stone ordered by him and shipped by plaintiff. There is evidence, on the contrary, that he had no such authority. Nor is there any evidence tending to show any facts from which the jury might find that the contract or transaction was within the apparent scope of Williams' authority as cashier. There had been no prior dealings between plaintiff and defendant, and no evidence of contracts or transactions by the cashier with other parties similar to this transaction, which had been ratified by the bank.

The question presented by this appeal, therefore, is whether the cashier of defendant bank had any implied authority to bind the bank by a guarantee of plaintiff's account against Cole for the stone.

It must be noted that the cashier, in this case, did not purchase stone of plaintiff for defendant, to be used in a building to be erected by defendant for the convenient transaction of its business. The defendant, as a corporation, engaged in the banking business, under the laws of this State, has the power to purchase and hold such real estate as shall be necessary for the convenient transaction of its business. Public Laws 1921, chap. 4, sec. 26. Whether a cashier has implied authority to purchase material for a building to be erected by his bank, is not presented in this case. The debt for the stone was Cole's debt,

not the debt of the bank. He was primarily liable. Plaintiff contends that the bank is liable only as a guarantor of Cole's debt.

Defendant, as a banking corporation, under the laws of this State, in addition to the powers conferred by law upon private corporations, has power "by its board of directors, or duly authorized officers and agents, subject to law, to exercise all such powers as shall be necessary to carry on the business of banking, by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of indebtedness, by receiving deposits, by buying and selling exchange, coin and bullion, by loaning money on personal security or real and personal property." C. S., 220 (a); Public Laws 1921, chap. 4. The words used in the statute relative to the powers of corporations engaged in the banking business under the laws of this State are almost identical with those used in the Federal statute, relative to the powers of National Banks. U. S. Comp. Stat. 1918, sec. 9661, subsec. 7.

"In the absence of an express grant of authority, a banking corporation, as a rule, has not the power to become the guarantor or surety of the obligation of another person, or to lend its credit to any person. No such power being conferred by the National Bank Act, this rule applies to National Banks." Tiffany on Banks and Banking, p. 284. "Banking associations from the very nature of their business are prohibited from lending credit." Magee on Banks and Banking, p. 466: "It is not within the ordinary functions of a bank to lend its credit, and so it cannot become an accommodation endorser. Neither is a bank authorized to become a guarantor, except where it is necessary to protect its rights where the guaranty relates to commercial paper and is an incident to the purchase and sale thereof, or when the guaranty is especially authorized by law." 7 C. J., 595. "A banking corporation cannot lend its credit to another by becoming surety, endorser or guarantor for him." 3 R. C. L., 425. Each of these statements as to the law is sustained by numerous citations of authority.

An exception has been made to the general proposition herein approved, where the bank enters into a guaranty for its own advantage as an incident to business in which it is authorized to engage (Tiffany on Banks and Banking, p. 285, and authorities cited), or where the bank has actually received benefit from one who has relied, in good faith, upon the guaranty. *Creditors Claim Co. v. Northwest L. & T. Co.*, 81 Wash., 247, 142 Pac., 670. This exception will not avail the plaintiff in the instant case, for, while the transaction on its face purports to be for the advantage of defendant as an incident to the erection of a building for bank purposes, the making of a guaranty, even if same is within the power of the bank, cannot be held to be within the implied powers of a cashier. If upon the facts appearing from

the evidence in this case, the defendant, by its board of directors, whose powers are larger than those of a cashier (Public Laws 1921, ch. 4, sec. 48), had authority to guarantee payment for stone shipped to Cole, it does not follow that the cashier, without express authority from the board of directors, was authorized to bind the corporation by a guarantee. Clearly a cashier has no implied power to make a contract binding on the bank which the bank itself has power to make only under special circumstances.

The judgment of nonsuit is sustained. Defendant is not liable to plaintiff as a guarantor of the payment for stone shipped upon the order of Cole, for the reason that J. E. Williams, cashier, was without authority, express or implied, to bind defendant as he undertook to do in his letter dated 24 October, 1921. Lack of liability is not determined by the fact that defendant had no interest in the building for which the stone was ordered, or that the cashier had a personal interest in the building in which the stone was used. Even if the facts had been otherwise, defendant could not be held liable upon the guaranty of its cashier, who had no express authority to make the guarantee, and whose authority to do so cannot be implied. It is the plaintiff's misfortune that it was not better advised as to the law when in reliance upon the letter of the cashier as the guaranty of the Angier Bank and Trust Co., it shipped the stone upon Cole's order. The judgment is amply supported by the authorities and is

Affirmed.

L. B. PERRY v. SOUTHERN SURETY COMPANY.

(Filed 14 October, 1925.)

1. Equity—Deeds and Conveyances—Reformation—Evidence.

Equity will not reform a deed into a mortgage for mistake upon evidence tending only to show that after considering the matter, the parties intended the instrument to be a deed, as it was finally written.

2. Same—Principal and Surety—Contracts.

Where the surety on a contractor's bond and the contractor have agreed that the contractor will save the surety harmless on account of any default under his contract with whatever property he may have in the way of tools, appliances and materials on hand, and thereafter under a separate agreement expressly referring to the original surety contract, the contractor conveys certain of his realty encumbered by a mortgage, the transactions will be construed together in their entirety to effectuate the intent of the parties, and accordingly the deed will be given effect as a mortgage security under the original contract of surety, and not an absolute conveyance.

3. Appeal and Error—Burden of Proof—Harmless Error.

On appeal to the Supreme Court, the burden is on the appellant not only to show error, but that it was prejudicial; and where there has been error committed in the court below, a reversal will not be had when upon the record it properly appears that a correct result has been reached, as a conclusion of law.

APPEAL by plaintiff from PASQUOTANK Superior Court. *Cranmer, J.*

Action by plaintiff to recover on a contract by defendant to complete plaintiff's building contract with Board of Graded School Trustees of Elizabeth City. From a judgment in favor of defendant, upon a jury verdict, the plaintiff appealed. Affirmed.

The plaintiff contended that he had a contract to build two school buildings for the Board of Trustees of Elizabeth City, and that on or about 1 July, 1922, he gave, with defendant as surety, a bond to "save said board harmless as to plaintiff's due and proper execution of said work"; that in August, 1923, he was in need of financial assistance to complete the high school building, and made application to the trustees to reduce the amount of the compensation agreed to be retained until the completion of the contract, to 10 per cent, with defendant's consent; but the trustees refused, for that they did not have the money on hand to make the desired advances. The plaintiff and defendant agreed, 11 September, 1923: (a) that plaintiff transfer and assign and set over to defendant all unpaid balances on building contract; (b) that plaintiff remain in charge of the construction work until completion of contract, without further charge for his services; (c) that plaintiff convey to defendant the Wineke Apartment property in Elizabeth City; (d) that plaintiff pay by his personal note $6,000 on specified claims already due; (e) that defendant pay all other labor and material accounts now due, as per statement, and all labor and material accounts accruing thereafter in the completion of the buildings; (f) that defendant is to keep in a named bank in Elizabeth City funds sufficient to pay for labor and material to complete the buildings, same to be deposited in the name of plaintiff trustee, and checks to be countersigned by defendant's attorney in fact, and checks to be issued on deposited fund for statements approved by plaintiff, who, by such approval, guarantees correctness; (g) that, at conclusion of contract for construction of buildings, the defendant render itemized statement to plaintiff for all disbursements, including attorney's fees; that the defendant furnished funds for material and work on buildings to the extent of $33,000, but wrongfully refused to continue to carry out the September contract, and did not pay the accounts agreed on, and damaged the plaintiff to the extent of the unperformed contract and caused his credit and business reputation to suffer damages in a large sum.

The defendant contended that, in July, 1922, its relations with plaintiff were fixed when it accepted the written application of plaintiff, and, upon it, executed his bond as surety, and that the subsequent agreement was pursuant to this relation, and that they advanced funds and took a deed for the Wineke Apartment property, and the assignment of the unpaid balance of the contract price, because of the duty of plaintiff to secure it, and finally to save defendant harmless on account of the suretyship, and denied plaintiff's contentions.

The application executed and admitted by plaintiff, contains among others, the following covenants:

"Second: That we, the undersigned, will at all times indemnify and keep indemnified the company, and hold and save it harmless from and against any and all liability, damages, loss, costs, charges and expenses of whatsoever kind or nature, including counsel and attorney's fees, which the company shall or may, at any time, sustain or incur by reason or in consequence of having executed the bond herein applied for, or by reason or in consequence of the execution by the company of any and all other bonds executed for us at our instance and request, and that we will pay over, reimburse and make good to the company, its successors and assigns, all sums and amounts of money which the company or its representatives shall pay or cause to be paid or become liable to pay, on account of the execution of any such instrument, and on account of any liability, damage, costs, charges and expenses of whatsoever kind or nature, including counsel and attorney's fees, which the company may pay, or become liable to pay by reason of the execution of any such instrument, or in connection with any litigation, investigation, or other matter connected therewith, such payment to be made to the company as soon as it shall have become liable therefor, whether the company shall have paid out said sum or any part thereof or not.

"Seventh: That these covenants and also all collateral security, if any, at any time deposited with the company concerning the said bond, or any other, former or subsequent bonds executed for us or at our instance, shall, at the option of the company be available in its behalf and for its benefit as well concerning the bond or undertaking hereby applied for, as also concerning all other former or subsequent bonds and undertakings executed for us or for others at our request.

"Eighth: That our execution of any other instrument, whether relative to the bond hereby applied for or to any other, former or subsequent bonds executed for us or at our request, shall not release us from liability under the foregoing covenants, unless such other instruments shall expressly stipulate that we shall be released from such liability.

"Eleventh: That the suretyship is for the special benefit of the indemnitor, its property, income and earnings now owned or hereafter acquired, to which the company looks for its indemnity, and the indemnitors represent that it is specifically and beneficially interested therein.

"Twelfth: That the company shall have every right and remedy which a personal surety without compensation would have, including the right to secure its discharge from its suretyship, and should it make payment hereunder, shall have every right and remedy of the undersigned for the recovery of same."

It is also covenanted that the defendant may have access to all books and papers, including deposit accounts, and that "these covenants shall be binding not only upon us jointly and severally, but as well upon our heirs, executors, administrators, successors and assigns."

The verdict is as follows:

"1. Did the plaintiff, Perry, and the defendant, Southern Surety Company, make and enter into that certain agreement of 11 September, 1923, a copy of which is attached to the complaint, as alleged in the complaint? Answer: Yes.

"2. If so, was a provision requiring the plaintiff, Perry, to repay the defendant company all such amounts as said company should pay out under the terms of said agreement, omitted therefrom by the mutual mistake of the parties, the inadvertence of said parties, or the draftsman (or the mistake of the defendant company, induced by the fraud of the plaintiff, Perry, as alleged in the answer)? Answer: Yes.

"3. Was said Perry ready, able and willing to perform said contract as alleged in the complaint? Answer: Yes.

"4. If so, was a provision permitting said Perry to redeem said property, upon the payment to defendant company of all amounts paid out by them under said agreement, omitted from said deed by the mutual mistake of the parties, or the inadvertence of said parties or the draftsman (or the mistake of the defendant company, induced by the fraud of the plaintiff, Perry, as alleged in the answer)? Answer: Yes.

"5. Did the defendant company wrongfully breach said contract, as alleged in the complaint? Answer: No.

"6. What general damages, if any, is the plaintiff, Perry, entitled to recover of the defendant company? Answer: None.

"7. What sum, if any, is the defendant company entitled to recover of the plaintiff, Perry? Answer: $15,000."

The judgment provides:

"That plaintiff take nothing by his cause of action set up in the complaint; that the contract and agreement and deed between the plain-

tiff and defendant be and the same are hereby reformed in accordance with the findings of the jury as above set out and the allegations of the answer.

"That the cause be and the same is hereby referred to E. L. Sawyer as referee, who will hear the evidence and state an account between the parties and ascertain the true amount due by plaintiff to defendant for advances made pursuant to said contract and agreement so reformed as prayed for in the answer, and who will make report to the next term of Superior Court in said county of the amount so found by him to be due by way of accounting from plaintiff to defendant, which sum so found shall be and constitute a lien against the premises known as the Wineke Apartment described in the pleadings in this cause, and also against the balance of funds on deposit in trustee's account referred to in said pleadings and also against the remainder of the funds on deposit in the office of the clerk of the Superior Court.

"That upon payment of said sum so ascertained upon said accounting to be due by plaintiff to defendant the said lien shall be discharged, and that upon failure of plaintiff to pay off and discharge the same, within 30 days from confirmation of said account by the court, said balance in trustee's account and said balance of funds in the clerk's hands shall be applied toward the satisfaction of said claim, and the balance of said indebtedness, if any, may be enforced by advertisement and sale of the premises known as the Wineke Apartment after advertisement as provided by law for and in the case of mortgages and deeds of trust, said sale to be made by the clerk of this court as commissioner of this court, who will be allowed 2 per cent commission not to exceed $250 for his services in advertising and conducting said sale, to be deducted from the proceeds along with the costs of advertising and sale, and who will apply the remainder of said proceeds as far as may be necessary to the discharge and satisfaction of the balance so found to be due to defendant as above set forth and pay over the surplus, if any, after so discharging the remainder of said indebtedness to the said L. B. Perry or his assigns.

The plaintiff appealed, assigning errors in the admission and rejection of evidence in the charge as to mistake, inadvertence and fraud, and in its refusal to grant plaintiff's motion to dismiss defendant's cross-action.

Aydlett & Simpson, McMullan & LeRoy for plaintiff.
W. L. Small, Ehringhaus & Hall for defendant.

VARSER, J. The defendant is not entitled to reform the contract and the deed for the Wineke Apartment property on the evidence. There is no evidence to support either the allegations of mutual mis-

take, inadvertence, or fraud. The defendant's witness, Butler, testified that he read the contract of 11 September, 1923; that a mortgage on the Wineke Apartment property was discussed, but a deed was finally written and recorded. The parties knew the contents of the contract and deed. Nothing was done to prevent a full understanding. Parties are required to exercise ordinary diligence in executing contracts, and they are fixed with all knowledge that diligence would have disclosed. *School Committee v. Kesler,* 67 N. C., 448; *Floars v. Ins. Co.,* 144 N. C., 241; *Dellinger v. Gillespie,* 118 N. C., 739; *Newbern v. Newbern,* 178 N. C., 4; *Griffin v. Lumber Co.,* 140 N. C., 520; *Harvester Co. v. Carter,* 173 N. C., 229; *Colt v. Kimball, ante,* 169.

It is also settled, in this jurisdiction, now, that a deed absolute upon its face cannot be converted into a mortgage unless it shall be established that the clause of defeasance was omitted by ignorance, mistake, fraud, or undue influence. *Chilton v. Smith,* 180 N. C., 472; *Gaylord v. Gaylord,* 150 N. C., 222; *Williamson v. Rabon,* 177 N. C., 304. This latter case overrules *Fuller v. Jenkins,* 130 N. C., 554. It is well settled that parol trusts cannot arise between the parties to a deed. *Gaylord v. Gaylord, supra; Bonham v. Craig,* 80 N. C., 224; *Newton v. Clark,* 174 N. C., 394; *Newbern v. Newbern, supra.*

These holdings do not, however, affect the main question in the case at bar.

The defendant contends that the contract of 1 July, 1922 (which consists of the plaintiff's application for bond accepted by defendant, and the indemnity bond to secure the owner of the buildings against the plaintiff's default in his building contract), creates such a relation between plaintiff and defendant that all subsequent transactions are, as a matter of law, a security. The defendant on 1 July, 1922, solemnly covenanted with defendant that his execution of "any other instrument, whether relative to the bond hereby applied for, or to any other, former or subsequent bonds executed for us, or at our request, shall not release us from liability under the foregoing covenants, unless such other instrument shall expressly stipulate that we shall be released from such liability." These "foregoing covenants" undertake, with much particularity, to provide for a continuing obligation to save the defendant harmless on account of its suretyship and it assigns all rights of plaintiff in "all tools, plant equipment and materials of every nature and description" that plaintiff may have, for use in and about the work, both on hand, in storage, or in transportation, as well as an assignment of all moneys "due or to become due," as provided in the building contract, with full power of attorney to execute all necessary papers to accomplish the desired result, to wit, the complete indemnity of defendant from loss.

The agreement of 11 September, 1923, on which plaintiff bases his action, refers to the transactions of 1 July, 1922, and the plaintiff's present need of financial assistance "for the purpose of completing the buildings" as contracted for, "which finances the Southern Surety Company has agreed to supply," as therein set out, and recites that the said Perry is desirous of saving said Southern Surety Company harmless, and does not stipulate that plaintiff is released from the liability on his covenants in the application for bond.

The consideration is thus recited: "In consideration of the mutual benefits to be derived." The conveyance of the Wineke Apartment property is one of the things to be done by plaintiff in consideration of the recited desire to save the defendant harmless, and the stipulation provides that it shall be conveyed by "proper deed."

There is no legal obstacle presented by the encumbrance on the Wineke Apartment property. The assumption of, and payment of this mortgage, by defendant, is only another item in the final accounting. *Veeder v. Veeder,* 141 Iowa, 492; *Dunton v. McCook,* 93 Iowa, 258.

We are minded to hold that, upon the contract of 1 July, 1922, and the agreement of 11 September, 1923, and the deed to defendant for the Wineke Apartment property, on same date, which deed is an express part of this agreement, that the whole transaction constitutes itself into that of "advancement and security," and debtor and creditor. The same rule that prevents defendant in its effort to reform the contract and deed of 11 September, 1923, holds the plaintiff to the performance of the covenants of 1 July, 1922.

Whenever a transaction resolves itself into a security, whatever may be its form, and whatever name the parties may choose to give it, it is, in equity, a mortgage. *Hames v. Williams,* 92 Maine, 483; L. R. A., 1916 B, 55 note, even if on its face, it may be a deed. *Edrington v. Harper,* 26 Ky., 353.

There are no special words required to constitute a mortgage. The test is whether the conveyance, or the whole transaction, is a security for the payment of money, or the performance of any act or thing. *Sandlin v. Kearney,* 154 N. C., 596; 37 L. R. A. (N. S.), 525, note; L. R. A., 1916 B, 144, note, 287, note.

In *Sandlin v. Kearney, supra,* the material facts were admitted in the pleadings, and in the case at bar, the admitted written instruments show the intention to create a security. The three written instruments, though executed on two different dates, are so linked together by express references and evident intention, that it is conclusive that they constitute only one transaction. 19 R. C. L., 244, sec. 7, 246 sec. 9; *Wilcox v. Morris,* 5 N. C., 116. The conveyance was intended to indemnify the

grantee, the defendant, for the assumption of some outstanding obligations of the plaintiff related to the subject-matter of the original contract. Therefore, it is security. *Watkins v. Williams,* 123 N. C., 170; *Robinson v. Willoughby,* 65 N. C., 520; *Noland v. Osborne,* 177 N. C., 14; *Russell v. Southard,* 13 L. Ed. (U. S.), 927. The recitals in the agreement of 11 September, 1923, have the same effect, *inter partes,* as recitals in the deed itself. A deed which recites that it is security for a debt is a mortgage. Devlin on Real Estate (3 ed.) Vol. 2, sec. 1125; *Wilson v. Fisher,* 148 N. C., 535.

Equity will, in doubtful cases, construe the transaction to be a security and not a sale, because this subserves the ends of justice and prevents imposition. If the idea of security appears with reasonable distinctness by the writings and no evil practice or mistake appear, courts will incline so to regard it, because the general rule which favors written evidence concurs with the reasons of justice. *Cornell v. Hall,* 22 Mich., 377; *Honore v. Hutchings,* 71 Ky., 687. When two or more papers are executed by the same parties at the same time, or at different times, and show on their face that each was executed to carry out the common intent, they should be construed together. *Chicago Auditorium Assn. v. Corporation of Fine Arts Bldg.,* 244 Ill., 532; 18 Ann. Cas., 253; *Canadian Coal Co. v. Lynch,* 115 Pac., 466; *Brake v. Blain,* 153 Pac., 158; *Longfellow v. Huffman,* 57 Org., 338, 112 Pac., 8; *Parker v. Supply Co.,* 186 Pa. St., 294, 40 Atlantic, 518.

It is proper, in the interpretation of a written contract, to consider all the attendant circumstances, the relation of the parties, and the object it had in view. *Bank v. Redwine,* 171 N. C., 559; *McMahan v. R. R.,* 170 N. C., 456; *Simmons v. Groom,* 167 N. C., 271; *Neal v. Ferry Co.,* 166 N. C., 563; *Slocumb v. R. R.,* 165 N. C., 338; *Hornthal v. Howcott,* 154 N. C., 228; *Hardy v. Ward,* 150 N. C., 385; *Fowle v. Kerchner,* 87 N. C., 49.

Regarding these rules and construing the application executed by plaintiff to the defendant 1 July, 1922, and the agreement of 11 September, 1923, and the Wineke Apartment deed together, and being fully conscious of the common intent of the parties, we hold that the dealings between the plaintiff and the defendant, thus evidenced, constitute an advancement on the part of the defendant, and a security therefor on the part of the plaintiff. *Bunn v. Braswell,* 139 N. C., 135; *Watkins v. Williams, supra; Robinson v. Willoughby,* 65 N. C., 520; *Sandlin v. Kearney, supra; Mason v. Hearne,* 45 N. C., 88; *Check v. B. & L. Association,* 126 N. C., 244; *Lutz v. Hoyle,* 167 N. C., 632; *Ray v. Patterson,* 170 N. C., 228; citing *Robinson v. Willoughby, supra; Mason v. Hearne, supra; Porter v. White,* 128 N. C., 44. This latter

case is an apt illustration of the instant case; the doctrine of reformation was denied, but, construing the papers together, the same result was reached.

Our ruling approves the judgment rendered by the court below, and if its rulings challenged by plaintiff's exceptions are erroneous, and its judgment is correct, it will not be disturbed.

We do not presume prejudicial error and the burden is upon the appellant to show, not only error, but that it is prejudicial. The judgment will be affirmed if, upon the entire record, no substantial right to the appellant has been denied, and, even if irregular, when the correct result has been accomplished. The appellant is not, upon any view of the record, entitled to recover. *Blevins v. R. R.,* 184 N. C., 324; *Quelch v. Futch,* 175 N. C., 694; *Mercer v. Lumber Co.,* 173 N. C., 49; *Oil Co. v. Burney,* 174 N. C., 382; *In re Will of Edens,* 182 N. C., 398; *Rankin v. Oates,* 183 N. C., 517; *Lindsey v. Bank,* 115 N. C., 553; *Ewbank v. Lyman,* 170 N. C., 505; *Butts v. Screws,* 95 N. C., 215; *Cherry v. Canal Co.,* 140 N. C., 422; *Shackelford v. Staton,* 117 N. C., 73; *Rierson v. Iron Co.,* 184 N. C., 363.

The right result having been reached in the court below, we conclude that there is

No error.

N. F. DICKERSON ET AL. v. NORFOLK SOUTHERN RAILROAD COMPANY AND JAMES K. DAUGHERTY, AND HOME INSURANCE COMPANY ET AL. v. NORFOLK SOUTHERN RAILROAD COMPANY AND JAMES K. DAUGHERTY.

(Filed 21 October, 1925.)

Negligence—Railroads—Fires—Prima Facie Case—Evidence—Nonsuit.

A prima facie case of negligence is made out in an action to recover damages against a railroad company for setting out a fire by its passing trains that destroyed a warehouse and its contents of plaintiffs situated off its right of way, when upon direct or circumstantial evidence it is sufficiently shown that a spark from the train resulted in the fire complained of, and not by circumstance remote as to time and place, which under the evidence in this case are held insufficient; and *Held,* defendant's motion as of nonsuit was properly allowed.

STACY, C. J., dissents.

APPEAL by plaintiffs from *Barnhill, J.,* February Term, 1925, of CRAVEN. Affirmed.

Certain actions pending in the Superior Court of Craven County against Norfolk Southern Railroad Company and James K. Daugherty, instituted by N. F. Dickerson and others, owners of a pack house and

a large quantity of tobacco stored therein, destroyed by fire on 3 November, 1920, and by certain insurance companies, which had paid to the owners of said property sums of money due under policies of insurance issued by them, were consolidated for trial. It was alleged in the complaints in said actions that the fire which destroyed said pack house and tobacco was set out by the negligence of defendants. This allegation was denied in answers filed by defendants. At the close of all the evidence, motion for judgment as of nonsuit was allowed. Plaintiffs excepted. From judgment in accordance with said motion, plaintiffs appealed. The only assignment of error upon appeal is based upon the exception of plaintiffs to the judgment of nonsuit.

Manning & Manning, Ward & Ward, E. M. Green and D. L. Ward for plaintiffs.

Moore & Dunn for defendants.

CONNOR, J. A pack house, owned by N. F. Dickerson, in which was stored a large quantity of tobacco, owned by Dickerson and his tenants, was destroyed by fire on 3 November, 1920. Certain insurance companies, which had issued policies of insurance on said property, paid to Dickerson and his tenants the amounts, for which they were severally liable, under said policies, by reason of the destruction of said property by fire.

On 2 June, 1923, Dickerson and his tenants commenced an action against defendants for the recovery of damages sustained by them because of the destruction of said pack house and tobacco. They allege that the property destroyed was of the value of about $30,000; that they received from insurance companies, on account of said loss, about $11,000 in settlement of the amounts due on policies covering said property; they demand judgment against defendants for the difference between the value of the property destroyed and the amount received by them from the insurance companies.

The insurance companies thereafter commenced actions against defendants in which they allege that prior to 3 November, 1920, they had severally issued policies of insurance to N. F. Dickerson and his tenants, insuring them against all direct loss by fire, said policies covering the pack house and tobacco stored therein; that by reason of the destruction of said property by fire, on 3 November, 1920, they became severally liable to the owners of said property in various amounts which they have paid; that by the provisions of their several policies, they have become subrogated to the rights of the owners of said property to recover damages from the person or persons who are liable for the same to the extent of the amounts severally paid by them. They

demand judgment against defendants for the amounts severally paid by them to N. F. Dickerson and his tenants.

Plaintiffs, in their several complaints, allege that on 3 November, 1920, defendant, Norfolk Southern Railroad Company, by and through its engineer, James K. Daugherty, was operating an engine and log cars on the spur track running from its main track, near the said pack house, to Munger & Bennett's Mill, on Trent River, at James City; that while so operating said engine and cars, defendants negligently permitted said engine to emit sparks and coals of fire therefrom which fell upon and set fire to said pack house and tobacco, causing the complete destruction of same; that defendants so operated said engine without a spark arrester, or with a defective spark arrester; that the engineer was negligent and incompetent, and operated the engine in a negligent manner.

Defendants, in their answers, denied all allegations of negligence.

The evidence offered by plaintiffs with respect to the origin of the fire which destroyed the pack house and its contents, was as follows:

F. A. Fulcher testified that he is a surveyor and that at the request of plaintiff, N. F. Dickerson, during October, 1924, he made a survey of the Norfolk Southern switch track extending from its main track to Munger & Bennett's Mill; that Mr. Dickerson showed him the location of the pack house, which was burned 3 November, 1920; the distance from the nearest point of the location of the pack house, as shown him by Mr. Dickerson, to the switch track was eighty-one feet; at this point the pack house was north of the switch track; this track was in a curve all the way from the main track to the mill-yard. It was located not far from the public road. There were other houses located in there, along the public road. The houses on the east side of the road are negro shacks. Munger & Bennett's Mill is located near the river, about a quarter of a mile to the north of where the pack house was located; in addition to their mill they have, and operate, a planing mill. In both mills there are a number of boilers and smoke-stacks.

N. F. Dickerson testified that on the afternoon of 3 November, 1920, the wind was blowing about northeast; that he saw the engine of defendant shifting on the switch track, passing the pack house, from Munger & Bennett's Mill to the Clark Lumber Company's plant; black smoke, coming from the engine, was blown across the pack house; the train switched in there for from a half to three-quarters of an hour. Witness saw the engine shifting between 4 and 4:30 p. m.; he saw only one train on the switch track that afternoon; he was at work during the afternoon about 250 feet from the pack house; he left the

farm some time before dark—between a quarter to and a quarter past 5 o'clock. The last place witness was in before leaving the farm was the pack-house yard. There was no fire in or about the pack house during the day.

Witness first heard of the fire when some one called him on the phone at his home in New Bern; he went at once, by automobile, to the pack house; when he got there the fire was burning on the roof. There was no fire below. The pack house and tobacco were completely destroyed.

There was no arrangement of any kind in the pack house for fire. There was no chimney, fireplaces or flues. The pack house had a shingle roof. It was located about 50 or 60 feet from the public road leading into New Bern.

Mrs. Sadie Dickerson, sister-in-law of N. F. Dickerson, testified that she lived in James City, a settlement across the river from New Bern, not very far from the pack house; she saw the fire about 6 o'clock, after her family had had supper. It was then burning on top, about middle way, very rapidly. She saw the Norfolk Southern shifter that afternoon, on the switch track, between a quarter to 5 and 5 o'clock. The smoke from the shifter was going toward the pack house. The side of the roof next to the track was burning when she first saw the fire.

K. L. Dickerson, husband of Mrs. Sadie Dickerson, testified that he had not been on the farm where the pack house was located that day. He got home about 5:30 or a quarter to 6. His wife called him when she saw the fire, about 6 or quarter past 6 o'clock. He went at once to the fire and found the roof of the pack house burning on top, next to the railroad. The wind was blowing from the northwest. It was burning a pretty good blaze when he got there.

J. T. Cherry, one of the tenants who had tobacco in the pack house, testified that he went to the farm on which the pack house was located, at about 8 a. m. on 3 November, 1920; that he took tobacco out of the pack house about 12 o'clock, to the grading shed; that he remained on the farm until a little before sundown. There was no fire there when he left. Witness saw the train on the switch track during the afternoon and observed heavy, black smoke coming from the engine and passing over the pack house. He knew nothing of the fire until next morning.

W. T. Messic, another tenant who had tobacco in the pack house, testified that he was eating supper between 5:30 and 6 o'clock when he first discovered the fire. He lived about 300 yards from the pack house. The fire was on the side next to the railroad. Witness saw the shifter on the switch track that afternoon, about 4 o'clock. A lot of black smoke was coming from the engine and going in the direction of the

pack house. He went to the fire. It was burning pretty rapidly when he got there. If the roof had been on fire when he left to go to supper he would have seen it. He looked at the pack house after the engine passed it. He had been home long enough to eat supper before the alarm of fire was given.

Albert Spivey testified that he lived in James City on 3 November, 1920, the day of the fire; that he saw the shifter in the mill yard of Munger & Bennett between 3 and 4 o'clock that afternoon; that he crossed the track and saw smoke coming from the engine; there were dead cinders in the smoke, which went in the direction of the pack house. When he saw the fire he had eaten supper and was out in the street in James City. He left Munger & Bennett's Mill before 5:30 p. m.

There was much evidence as to the quantity and quality of the tobacco stored in the pack house and destroyed by fire.

Defendant's motion for judgment of nonsuit, made at the close of plaintiff's evidence, was reserved by the court until the conclusion of all the evidence.

Defendants offered evidence as follows:

James K. Daugherty testified that he was employed during 1920 as an engineer by Norfolk Southern Railroad Company; that prior to 3 November, 1920, he had operated yard engine No. 6 for about 130 days, and since said date, for 12 or 18 months. On 3 November, 1920, witness went on duty at 1 p. m., and took said engine, with one car, to Munger & Bennett's Mill; he got back from James City about 2 o'clock, bringing one car from the mill. He did not operate an engine on the switch track on that day after 2 o'clock. Between 6 and 7 o'clock p. m., while at Trent River, he saw the fire at the pack house. His engine was not throwing sparks on 3 November, 1920. The condition of the spark arrester on the engine on that day was good. It was equipped with a spark arrester. Green, new coal burned in an engine causes black smoke.

Sam Brock, fireman on engine No. 6, testified that he went with Mr. Daugherty on said engine on 3 November, 1920, to James City. They went over there about 1 o'clock with one box car, and made a switch in Munger & Bennett's yard; they got back to New Bern at about 2 o'clock and did not go back that day. No shifting was done that day near the pack house. The engine was not throwing sparks that day.

Witness fired his engine after he left New Bern, and while he was over the river at Munger & Bennett's Mill. He covered the fire with fresh coal, which made a lot of smoke, but no sparks. He kept up enough steam while on the switch track to pull one car. The engine passed the pack house between 1 and 2 o'clock. The engine was inspected every day.

Roy Perry, yard conductor for Norfolk Southern Railroad, testified that he was in charge of engine No. 6 on 3 November, 1920; they left New Bern on that day about 1 o'clock; went to Munger & Bennett's, carrying and bringing back one car; it took about 15 or 20 minutes to do the work at the mill on that day. The train passed the pack house going in and coming out; no switching was done near the pack house. Witness operated engine No. 6 about six years; never saw it throw sparks.

Will White, brakeman, testified that on 3 November, 1920, they left New Bern about 1 o'clock, remained in James City ten or fifteen minutes, and got back to New Bern at about 2 o'clock; carried over one car and brought back one car. Witness rode on top of the car and did not feel or see any sparks from the engine. The smoke was coming right over him.

Mr. Sanders, yard master, testified that he had control and direction of all shifting engines in the yard. The record in witness' office shows that on 3 November, 1920, one car of lumber was placed at Munger & Bennett's yard, and one car pulled out. The crew on engine No. 6 came on duty at 1 o'clock. Witness directed them to go to James City. Only engine No. 6 was sent to James City that day. It was back in New Bern at 2 o'clock.

Witness had known James K. Daugherty for 17 years. His general reputation and character is good. There is no better engineer than Mr. Daugherty.

O. H. Hill testified that he is a boiler maker; on 2 November, 1920, witness examined engine No. 6; also examined it on 3 and 4 November and subsequent days; that it was in good condition; no repairs made to either spark arrester or ash pan. Witness inspected engine No. 6 on 10 October, 1920, and then patched the spark arrester and ash pan. After these patches had been put on the engine was as good as new.

Harvey Kehoe, general foreman of Norfolk Southern shops for 13 years prior to 1921, testified that he had known James K. Daugherty since 1906; that his general character and reputation was good; that his capacity as an engineer was good; he was a competent engineer. Witness had operated a locomotive engine for about thirty-eight years; black smoke is caused by green coal—absolutely no sparks in it.

Howard Bobbitt, road foreman of engines for defendant railroad company, testified that engine No. 6 received general repairs in April, 1920; on 3 November, 1920, its condition was good, as good as a new engine.

At the conclusion of all the evidence, the court being of opinion that there was not sufficient evidence of negligence to be submitted to the

jury, upon defendant's motion, dismissed the action as upon a nonsuit, under C. S., 567.

Applying to this evidence the rule well settled for the consideration of evidence upon a motion for judgment of nonsuit, *Lindsey v. Lumber Co.*, 189 N. C., 118, the following facts may be found therefrom:

1. The pack house and tobacco stored therein, located at a distance of 81 feet from the switch track of the Norfolk Southern Railroad Company, and of 50 to 60 feet from the public road, leading into James City, were destroyed by fire on 3 November, 1920;

2. Engine No. 6, used in and about New Bern by defendant railroad company as a shifter or switch engine, during the afternoon of said day, entered upon the switch track, and carried one car to the Munger & Bennett Mill, at the end of said switch track; it passed the pack house and while on the track was shifting or switching for about a half to three-quarters of an hour; it passed the pack house on its return from the mill, with one car, to New Bern; while thus engaged the engine put out heavy, black smoke, with dead cinders, which was blown by a strong wind across to and over the pack house; there is no testimony that the engine emitted sparks or live coals while passing or repassing the pack house.

3. The engine was on the switch track not later than 4:30 or 5 p. m.; fire was first discovered, burning on the top of the pack house, near the middle, on the side next to the track, at about 6 p. m.; a strong wind was blowing and the fire on the shingle roof was burning rapidly in a blaze; the building and contents were quickly consumed by the fire, making a total loss.

4. Engine No. 6 was the only engine which defendants, Norfolk Southern Railroad Company, operated on the switch track, passing by the pack house, during the afternoon of 3 November, 1920; it had been repaired in April, 1920, and was then as good as a new engine; it was equipped with a spark arrester which, with the ash pan, had been patched on 10 October, 1920; it was inspected on 2 and 3 November, 1920, and was in good condition; it did not throw out or emit sparks. James K. Daugherty, in charge of said engine, was a competent engineer; the heavy, black smoke was caused by the fireman putting fresh coal on the fire in the engine while it was at the Munger & Bennett Mill; the engine, at no time during the afternoon, while on the switch track, was pulling more than one car; only sufficient steam was kept up for this purpose.

There is no direct evidence from which the jury could find that sparks emitted by defendant's engine set fire to the pack house; the facts and circumstances, which the jury could have found from the evidence,

under correct instructions from the court are not sufficient to support the inference that the fire originated from such sparks. The facts that the engine passed and repassed a point on the track 81 feet from the pack house, and at the time was putting out a heavy, black smoke, which the wind blew over to and across the pack house, were not sufficient to support a finding, as a fact, that the fire discovered on the shingle roof, burning rapidly in a blaze, nearly an hour thereafter, during which a strong wind was blowing, was caused by sparks emitted from the engine as alleged in the complaint.

In *Moore v. R. R.,* 173 N. C., 311, *Justice Brown* says: "It is undoubtedly true that the fact in controversy here, as to the origin of the fire, may be established by circumstantial evidence, but the circumstances proven must have sufficient probative force to justify a jury in finding that the fire originated from a spark from defendant's engine before the issues can be submitted to them."

The rules applicable in actions to recover damages caused by injury or destruction of property, by fire, upon allegations of negligence, formulated by *Chief Justice Clark* in *Williams v. R. R.,* 140 N. C., 623, and approved by *Justice Walker* in *Aman v. Lumber Co.,* 160 N. C., 369 as just, are each predicated upon the fact that the fire, which injured or destroyed the property, escaped from defendant's engine. Until that fact has been established by evidence, no prima facie case is made for plaintiff. In the instant case, as in *Moore v. R. R., supra,* the building burned was located on the side of the railroad, off the right of way; the wind was blowing from the railroad toward the building. The fire, when discovered, was burning on the side of the building next to the railroad. An engine had passed not less than thirty minutes or more than an hour before the fire was discovered. There was no evidence that the engine, which passed the building before the fire was discovered, was throwing sparks, nor was there evidence that fire had burned from the track to the building. Defendants' evidence established the facts that the engine was equipped with a spark arrester, in good condition, and that the engineer in charge was competent and was operating the engine in a skillful manner.

In *Boney v. R. R.,* 175 N. C., 354, there was evidence that the passing engine was throwing sparks and the refusal of the motion to nonsuit was sustained by this Court. *Justice Hoke,* in the opinion of the Court, distinguishes *Moore v. R. R., supra,* from *Boney v. R. R.,* saying that in the *Moore case* there was no evidence offered that sparks were thrown from the engine or that same was in any way defective, whereas there was such evidence in the *Boney case.*

In *Bailey v. R. R.,* 175 N. C., 699, the refusal of the motion of nonsuit was sustained because there was evidence from which the jury could

fairly and reasonably infer and conclude that the engine emitted sparks or live coals which fell upon defendant's right of way, which was in a foul and inflammable condition, and started the fire which burned plaintiff's property.

In *Perry v. Mfg. Co.,* 176 N. C., 70, *Justice Walker,* approving the charge of the court below, that if the fire was caused by defendant's engine emitting sparks or coals, which fell upon plaintiff's land and caused the fire, the burden would be shifted to defendant to show that the fire was not due to any defective condition of its engine, or to any negligence in its management or operation, says: "There was ample evidence to show that the fire was caused by defendant's engine." See, also, *Bradley v. Mfg. Co.,* 177 N. C., 153; *Williams v. Mfg. Co.,* 177 N. C., 512. The instruction to the jury in the latter case was held subject to criticism, but not reversible error; there was evidence of other facts than those embodied in the instruction assigned as error tending to show that the fire originated from sparks emitted by the engine. *Justice Walker* says: "The fact that a spark from the engine caused the fire, whether on or off the right of way, is evidence of negligence, though not conclusive."

In *Cotton Oil Company v. R. R.,* 183 N. C., 95, *Justice Adams* says in the opinion for the Court, discussing the effect of a prima facie case for the plaintiff: "When the plaintiffs proved that the property had been destroyed by fire escaping from defendant's locomotive, they made a prima facie case of negligence for the consideration of the jury; or as *Mr. Justice Pitney* says, such proof furnished circumstantial evidence of negligence; but it did not impose upon defendant the burden of rebutting the prima facie case by the preponderance of the evidence and standing alone, the prima facie case warranted but did not compel the inference of negligence; it furnished evidence to be weighed, but not necessarily to be accepted; it made a case to be decided by the jury but did not forestall the verdict." *White v. Hines,* 182 N. C., 288; *Speas v. Bank,* 188 N. C., 524; *Hunt v. Eure,* 189 N. C., 482.

In the instant case there is no evidence from which the jury could find, or fairly and reasonably infer and conclude the fact, which under our decisions, would make a prima facie case, to wit, that the fire which destroyed the pack house and its contents was caused by sparks or live coals emitted by defendant's engine. The evidence, if submitted to the jury, would leave them to conjecture and speculate as to the origin of the fire; this is not sufficient. *Whittington v. Iron Co.,* 179 N. C., 647; *S. v. Bridgers,* 172 N. C., 879; *Liquor Co. v. Johnson,* 161 N. C., 75; *Lewis v. Steamship Co.,* 132 N. C., 904. In the latter case this Court approved the rule that evidence which merely shows it

possible for the fact in issue to be as alleged, or which raises a mere conjecture that it is so, is an insufficient foundation for a verdict and should not be left to the jury.

There was no error in allowing the motion to dismiss the action as upon nonsuit. The judgment is

Affirmed.

STACY, C. J., dissents.

IN RE WILL OF MISS HENNIE P. CREECY.

(Filed 21 October, 1925.)

1. Wills—Testamentary Capacity — Mental Capacity—Instructions—Appeal and Error.

To make a will valid it is required that the testatrix should have a sufficient mind to comprehend intelligently the nature and extent of her property, those whom she wishes to benefit, without controlling effect given to her literacy or illiteracy or to the quality of her intellect, and while it is at least questionable for the judge to charge the jury that they must have a "clear" understanding in this respect, it will not be held for reversible error if the charge taken as a whole is not prejudicial to the appellant.

2. Same—Undue Influence—Evidence—Relationship.

Upon the question of the mental capacity or undue influence upon the testatrix in making a will, evidence is competent to show that the ones who were in relationship with her were to be considered worthy of her consideration, and their condition, and whether they were in need of her benefits at the time.

VARSER, J., dissents.

APPEAL by propounders from *Cranmer, J.*, and a jury, at June Term, 1925, of PASQUOTANK. No error.

J. B. Leigh, Ehringhaus & Hall and McMullan & LeRoy for caveators.

Thompson & Wilson and Aydlett & Simpson for propounders.

CLARKSON, J. The issues submitted to the jury and their answers thereto were as follows:

"1. Was the execution of the paper-writing purporting to be the last will and testament of Miss Hennie P. Creecy procured by undue influence of Mrs. Nannie C. Cahoon, or others, as alleged in the caveat? Answer: Yes.

"2. Did Miss Hennie P. Creecy at the time of the execution of said paper-writing, to wit, 28 October, 1922, have sufficient mental capacity to execute the same? Answer: No.

"3. Is the paper-writing propounded, and every part thereof, the last will and testament of Miss Hennie P. Creecy? Answer: No."

Nash, C. J., in *Marshall v. Flinn,* 49 N. C., 203, said: "He then instructed the jury, 'that weakness of mind was not, *of itself,* a valid objection, as the law did not undertake to measure the size of a man's intellect; that it did not require that he should be a wise man; that if he was between the wise and the foolish sort, although he inclined rather to the foolish, he was, in law, capable of making a last will and testament, etc.; that he must do it with understanding and reason, and if the jury should be satisfied that, at the time of executing the supposed will, William Marshall had not understanding and reason, they should find a verdict against the will; that if the supposed testator knew what he was doing at the time of making the supposed will, and that he was giving his property to the plaintiffs, and that they would be entitled to it, provided the forms of law were complied with, then they were to find in favor of the will.' We are at a loss to perceive any error in this part of the charge; it correctly embodies the rule of law upon the question of the alleged insanity of the testator, and is very nearly in the language of some of the most approved writers on the subject."

In *Barnhardt v. Smith,* 86 N. C., 483, the following instructions were held no error: "The law does not require that persons should be able to make a disposition of their property with judgment and discretion in order to the validity of their act, and it is sufficient if the deceased understood what he was about. . . . The law did not require a high degree of intelligence, but in order to the validity of an act of disposition, it was necessary that the deceased should have *fully understood what he was doing.* (Italics ours.) The exception was to the concluding words. We think there is no error, and that the language used, 'fully understood,' means only that the deceased did *understand* what he was engaged in doing, and is in antagonism to a partial or imperfect apprehension of it."

In *Bost v. Bost,* 87 N. C., p. 479, *Smith, C. J.,* approves the following definition as to "mental capacity" to make a will: "They were directed that if the deceased has at the time of executing the paper-writing sufficient mental capacity to understand the nature and character of the property disposed of, who were the objects of his bounty, and how he was disposing of the property among the objects of his bounty, then he was capable of making a valid disposition of his property by will. This definition of testamentary capacity is in harmony with former adjudications. *Horne v. Horne,* 31 N. C., 99; *Moffitt v. With-*

erspoon, 32 N. C., 185; *Paine v. Roberts,* 82 N. C., 451; *Barnhardt v. Smith,* 86 N. C., 473"; *Crenshaw v. Johnson,* 120 N. C., 270; *Mitchell v. Corpening,* 124 N. C., 472.

This definition in practically the same language is approved in *Daniel v. Dixon,* 161 N. C., 377; *In re Craven's Will,* 169 N. C., 561; *In re Rawlings' Will,* 170 N. C., 58.

Walker, J., In re Craven's Will, supra, pp. 566-7, says: "As we understand the law, there is no special formula for charging the jury as to the mental capacity required for the valid execution of a deed or will. . . . It follows that one who is incapable at the moment of comprehending the nature and extent of his property, the disposition to be made of it by testament, and the persons who are or should be provided for, is not of sound and disposing mind. And if this mental condition be really shown to exist, the will must fail, even though he may have a glimmering knowledge that he is endeavoring to make a testamentary disposition of his property. It is here to be observed that some of the earlier cases have laid down the rule of testamentary capacity with much more subservience to and consideration for the purported expression of one's last wishes. They seem to have assumed that there must be a total want of understanding in order to render one intestable; that a court ought to refrain from measuring the capacity of a testator, if he have any at all; and that unless totally deprived of reason and *non compos mentis,* he is the lawful disposer of his own property, so that his will stands as a reason for his actions, harsh as may be its provisions. This ascribes altogether too great sanctity to the testamentary act of an individual as opposed to the law's own will set forth by the statutes and founded in common sense; and it is well that the best considered of our latest cases recede from so extreme and false a standard. Notwithstanding the modern rule to be favored, we should still, however, bear in mind that incapacity is more than weak capacity; and, as already intimated, mere feebleness of mind does not suffice to invalidate a will, if the testator acted freely and had sufficient mind to comprehend intelligently, the nature and effect of the act he was performing, the estate he was undertaking to dispose of, and the relations he held to the various persons who might naturally expect to become the objects of his bounty. While it is true that it is not the duty of the court to strain after probate, nor in any case to grant it where grave doubts remain unremoved and great difficulties oppose themselves to so doing, neither is it the duty of the court to lean against probate, and impeach the will merely because it is made in old age or upon the sick bed, after the mind has lost a portion of its former vigor and has become weakened by age or disease. Weakness of memory, vacillation of purpose, credulity, vagueness of thought,

may all consist with adequate testamentary capacity, under favorable circumstances. And a comprehensive grasp of all the requisites of testamentary knowledge in one review appears unnecessary, provided the enfeebled testator understands in detail all that he is about, and chooses rationally between one disposition and another. Schouler on Wills, 2 ed., 68 to 72, and notes." *In re Ross' Will,* 182 N. C., 477.

1 Schouler on Wills, Executors and Administrators (5 ed.), part sec. 68, says: "For as a general proposition, if the testator possesses mind sufficient to understand without prompting the business about which he is engaged when his will is executed, the kind and extent of the property to be willed, the persons who are the natural objects of his bounty, and the manner in which he desires the disposition to take effect, his will is a good one. To quote *Cockburn, C. J.,* it is admitted on all hands that in these varieties of mental unsoundness as distinguished from mental derangement, 'though the mental frame may be reduced below the ordinary standard, yet, if there be sufficient intelligence to understand and appreciate the testamentary act in its different bearings, the power to make a will remains.' It follows that one who is incapable at the moment of comprehending the nature and extent of his property, the disposition to be made of it by testament, and the persons who are or should be provided for, is not of a sound disposing mind. And if this mental condition be really shown to exist, the will must fail, even though he may have a glimmering knowledge that he is endeavoring to make a testamentary disposition of his property."

Nash, C. J., in *Marshall v. Flinn, supra,* p. 204, approves the following charge as to what constitutes "undue influence": "That the only influence which the law condemns, and which destroys the validity of a will, is a fraudulent influence, controlling the mind of the testator, so as to induce him to make a will which he otherwise would not have made." *In re Will of Hurdle, ante,* 221.

With these authorities, the law of this jurisdiction, we now come to consider the material assignments of error.

The propounders contend that the will was valid; Miss Hennie P. Creecy had sufficient mental capacity to execute the will, and that the same was not procured by undue influence of Mrs. Nannie C. Cahoon or others. That the court below charged the jury that for Miss Creecy to make a valid will within the meaning of the law that she had to have "a *clear understanding* of the nature and extent of her act; of the kind and value of the property devised or disposed of in the will; of the persons who are the natural objects of her bounty, and of the manner in which she desired to dispose of property to be distributed." That this was prejudicial and reversible error. If this

stood alone, the contention of propounders would have some weight, but the court below charged, before the expression "a clear understanding," the law fully and correctly, as follows: "I will now proceed to instruct you relative to the law relative to sufficient mental capacity to execute a will. It does not require the highest degree of intelligence to be able to execute a will, nor does it require a high degree of intelligence to do so. It is not a question of literacy or illiteracy—persons who can neither read nor write, if they are otherwise qualified mentally, have the same right and power to make a will that a person who is well educated has. It does not require education, that is not the question, it is not a matter of education, but of mental capacity. It does not require the highest, nor does it require a high degree of intelligence or mental capacity. If the person making the will has sufficient understanding to know what she was about, and to understand what property she had, and understand to whom she desires to convey it, or devise and bequeath, and the extent and consequences of her act, and what property she is conveying, then she would have sufficient mental capacity to make a will. The question for you to decide is: Did Miss Hennie P. Creecy on 28 October, 1922, the date she made the will, have sufficient mental capacity to understand what property she had, to whom she desired to convey it in the will, and the nature and character of the transaction, and the result and consequence of it. If she did, then she had sufficient mental capacity to make the will. A person has testamentary capacity within the meaning of the law—that is, capacity to make a will, *if he has a clear understanding,*" etc.

It will be seen that the court before the expression *clear understanding,* uses *"sufficient understanding"—"mental capacity to understand,"* and charges that it does not require the highest degree of intelligence, nor a high degree. It is not a question of literacy or illiteracy—does not require knowledge of reading or writing—does not require education. It is a matter of mental capacity.

In re Staub's Will, 172 N. C., p. 141, on the issue of mental capacity, the verdict was for the caveators, *propounders were appellants.* "The court gave the prayers for instruction asked *by the appellants.* The court defined testamentary capacity: 'A person has testamentary capacity within the meaning of the law if he has *a clear understanding* of the nature and extent of his act, of the kind and value of the property devised, of the persons who are the natural objects of his bounty, and of the manner in which he desires to dispose of property to be distributed,'" etc.

This charge was neither approved or disapproved by this Court, and upon review of the whole case this Court found no error. The pro-

pounders requested the instruction, lost and appealed, and then assigned error as to their own prayer.

In re Craven's Will, supra, Walker, J., uses the words "Had sufficient mind to comprehend intelligently," etc. *Stacy, J.,* (now *C. J.*), *In re Ross' Will, supra,* approves this language.

It will be noted that in *Barnhardt v. Smith, supra,* exception was taken to "it was necessary that the deceased should have *fully understood* what he was doing." *Smith, C. J.,* said: "We think there is no error, and that the language used, 'fully understood,' means only that the deceased did *understand* what he was engaged in doing, and is in antagonism to a partial or imperfect apprehension of it."

The learned judge who tried this case charged "a clear understanding" from the *Staub case, supra.* We think it goes a shade beyond the true rule.

The charge should be taken as a whole, and so interpreted. We cannot hold it for prejudicial or reversible error.

The propounders assign error to the following excerpt from the charge: "He has the right to give to one or more persons to the exclusion of all others, but it is a circumstance which the jury may consider in passing upon a person's mental capacity." The whole is: "The mere fact that a person gives his property to one relative to the exclusion of other relatives, does not, of itself, vitiate his will, and any person who has testamentary capacity and is not unduly influenced to execute a will, may give his property to any one he chooses, he has the right to give to one or more persons to the exclusion of all others, but it is a circumstance which the jury may consider in passing upon a person's mental capacity, and if you find in this case that Miss Hennie P. Creecy had, at the time she made the will, to wit: 28 October, 1922, testamentary capacity to make a will, and was not under undue influence, she had the right to give her property in her will to any person she chose to give it to. But if you find she was unduly influenced, or did not have sufficient mental capacity to make a will that would be sufficient to make void the will." This charge is substantially taken from the charge approved *In re Staub's Will,* 172 N. C., p. 140.

Assignments of error were made to the following testimony of R. B. Creecy:

"Mrs. Cahoon told me she owned a farm and that her husband owned a farm.

"Q. Where? Answer: I know where it is situated, or near about.

"Q. What sort of a farm is it? Answer: A very valuable farm, I should say it is among the best farms in the county, and the neighborhood is an elegant neighborhood.

"Q. What would you say in your opinion, it is worth? Answer: I know very little about land values, but I should say it is worth $10,000. I know she owns the farm for she told me so.

"Mrs. Winston is dead. The circumstances of her children are very straining. Duncan (Mrs. Wales) has to work, and she has a small child, too; and her husband has to work for a living. I only own a small lot, no revenue from it, but revenue going out. It is not the lot I live on. I rent. There is no house on it. The Lamb children were mighty poorly situated as far as money is concerned when they left. My last knowledge of them they did not have anything. Their health was frail. One died with tuberculosis and others had it.

"Q. Do you know anything that your brother, Joshua, owned? Answer: Not a thing that I know of. And do not know anything about his physical condition, except what he has written me."

In the record it appears: The caveators are Joshua Creecy and R. B. Creecy, the brothers of the said Miss Hennie P. Creecy, deceased, and that the other caveators are the nieces and nephews of the said Miss Hennie P. Creecy, deceased, being the children of her deceased brothers and sisters. Mrs. Nannie Creecy Cahoon is the sole devisee and legatee named in the said paper-writing, and Joshua Creecy, Pruett Creecy, John B. Creecy, Margaret P. Creecy, Mary Kirkpatrick and E. H. P. Creecy of St. Louis, Sarah B. Plummer of New York, Frances Bitzer of Los Angeles, California; Duncan Winston Wales, of Edenton, N. C.; Thomas Nichols Winston of Boston, Mass., and R. B. Creecy, Selden Lamb, and Mrs. Nannie Creecy Cahoon of Elizabeth City, N. C., Tazwell Lamb, Fred Lamb, John Lamb and Paul Lamb, of El Paso, Texas, and certain children of a deceased sister of the said Miss Hennie P. Creecy, deceased, now living in the State of New York, whose names and exact addresses are unknown, are the sole heirs and distributees of the said Miss Hennie P. Creecy."

We think the weight of authority makes this evidence competent.

In 40 Cyc., p. 1160—note, it is said: "In passing on the justice or inequality of a will in so far as it bears on the question of fraud and undue influence, the financial condition of persons mentioned in, or excluded from, the will may be considered. *Mowry v. Norman,* 223 Mo., 463, 122 S. W., 224; *In re Esterbrook,* 83 Vt., 229, 75 Atl., 1. Thus it is proper to admit and consider evidence that such persons had property of their own (*Eastis v. Montgomery,* 95 Ala., 486, 11 So., 204, 36 Am. St. Rep., 227), or were entitled to receive a large amount under the will of another person (*Davenport v. Johnson,* 182 Mass., 269, 65 N. E., 392, 8 Prob. Rep. Ann., 262), or were in poor and straitened circumstances (*Gurley v. Park,* 135 Ind., 440, 35 N. E.,

279; *Manatt v. Scott,* 106 Iowa, 203, 76 N. W., 717, 68 Am. St. Rep., 293." *In re Hinton's Will,* 180 N. C., 206; *In re Stephens' Will,* 189 N. C., p. 273.

The record contains 156 pages and the briefs 44. We have read the record, examined the briefs carefully, and heard the oral arguments. The case was carefully tried in the court below, in accordance with the law. If the jury's verdict on the facts as contended by propounders, was an injustice, this is not in our province to determine, but solely theirs. The jury, under our law, are the triers of fact and are presumed to have been men of "good moral character and of sufficient intelligence." They are required to be tax-payers and had paid their taxes for the preceding year. In matters of this kind, this Court, on appeal, has jurisdiction only to review the decision of the trial court "upon matters of law or legal inference." Verdicts and judgments are presumed to be right according to law and justice.

Ordinarily the burden is on the defendant to show prejudicial or reversible error. *In re Ross,* 182 N. C., 478; *S. v. Love,* 189 N. C., 774.

On the entire record we can find, in law, no prejudicial or reversible error.

No error.

VARSER, J., dissents.

POLLY PADERICK, ADMINISTRATRIX OF WILLIE PADERICK, DECEASED, v. GOLDSBORO LUMBER COMPANY.

(Filed 21 October, 1925.)

1. Pleadings—Evidence—Variation—Appeal and Error.

Held, the proof in this case was not at sufficient variation with the allegations of the complaint as to make its admission reversible error.

2. Employer and Employee—Negligence—Independent Contractor—Safe Place to Work.

An employee of an independent contractor to haul timber from the woods and load cars at a certain price per thousand, with implements and machinery of the defendant engaged in this business, is to be regarded as an employee of the defendant in respect to exercising reasonable care in furnishing safe appliances to do the work, etc., and make the defendant liable for a negligent defect in the machinery that proximately caused the injury, the subject of the action for damages.

3. Negligence—Intervening Cause—Proximate Cause.

Where the employer in the exercise of reasonable care was negligent in furnishing his employee a defective skidder or machine for handling or loading logs on cars, which resulted in a log falling, striking a small

tree on its way down hill and rebounding upon the employee to his injury and death: *Held*, the negligent act of the employer reaches through to the resultant injury, and the doctrine of intervening or independent cause has no application.

VARSER, J., not sitting.

APPEAL by defendant from *Devin, J.*, and a jury, April Term, 1925, of ONSLOW. No error.

Polly Paderick was duly appointed and qualified as administratrix of Willie Paderick. She alleges that the Goldsboro Lumber Company is a corporation, with a place of business in Craven County, at Dover, but, that it owns and operates sawmills, logging equipment, railroads, and other machinery and property used in connection therewith, and extends its railroad and logging roads into Onslow and Duplin counties, in said State.

On the 4th day of May, 1923, the defendant was engaged in the cutting and loading on the cars of defendant, timber trees in and along Limestone Swamp, in Duplin County. That as a part of the equipment in said logging business so used by the said defendant, there was included a machine for loading the logs which were brought out of the woods by machinery near to the track of the defendant, on which was the said loading machine. That one L. L. Paderick was looking after the operation of the said machinery, track and cars, and the cutting and loading of the said timber for the defendant at the time and place above set out, but the said operations were done for and by the defendant corporation, which was the owner of all of the said railroad, trains, engines, cars, loading machine and logging equipment, including the loading apparatus which was operated by steam, and the machinery and contrivances by which the said timber trees were pulled out of the swamp to the track for loading purposes, and when so loaded they were carried by the said defendant to its mills for manufacturing purposes.

She contends that her intestate was killed due to the negligence of the Goldsboro Lumber Company, in that, in connection with these operations, they used a loader or skidder, which was defective in respect to the boom and in other respects, and while in their employ, in connection with others, in pulling logs up to the loader, that a log was pulled up, and by reason of the defective condition of the loader, the log was placed in improper position where it could not be handled properly, and in their effort to place it right, by reason of this defective machinery, the log was caused to roll, and struck against a tree, which caused it to be thrown violently against the plaintiff's intestate, and

caused his death, and that this was due to the negligence of the Goldsboro Lumber Company in this respect among others.

The defendant, Goldsboro Lumber Company, answers in which it denies that it was in anywise negligent, in causing the death of Willie Paderick, and sets up certain defenses It sets up the defense and contends that Willie Paderick was not in the employ of the Goldsboro Lumber Company, but was in the employ of L. L. Paderick, who was an independent contractor, in respect to whose operations this defendant had no control, and therefore his death was not due to any negligence upon its part, and denies that it was negligent in respect to the condition of the loader or skidder, and alleges that its condition was such as was approved and in general use in this territory in operations of like character, and sets up the further defense, that the death of Willie Paderick was due to his own want of care with respect to his own safety, that he was guilty of contributory negligence, and that he failed to keep a proper lookout and permitted himself to be struck by a falling tree, when in the exercise of due care, he could have seen it and have avoided being hit, and denies any liability for his death:

L. L. Paderick testified for plaintiff, after describing the defect in the machine, as follows: "I told Capt. Tom Lowry of the condition of the machine. It was the company's business to keep it in repair. It was not many days, not two weeks before this happened that I called the company's attention to the condition of the machine. Nothing was done to repair the condition of the machine. Mr. Lowry said he did not have a blacksmith to put it in work and for me to go ahead with the machine and handle it the best I could handle it until they could get some one to fix it. They never fixed the machine."

T. F. Sanders, for plaintiff, testified: "I asked Mr. T. F. Lowry (working for defendant as foreman of the woods) why he did not fix that machine so we could do something with it, and he said: 'We cannot do anything with that machine in the shape the boom is in.' He said he kept thinking he would have something done, but kept putting it off, did not have anybody to do it."

T. F. Lowry, on cross-examination, said: "He, Paderick, did come to me, and I told him I would have it fixed, but that I did not have a blacksmith. Mr. Sanders also came and reported its condition. I told him that it ought to be fixed and was going to do it. I just have things fixed when they need to be fixed."

The issues submitted to the jury and their answers thereto were as follows:

"1. Was L. L. Paderick independent contractor of Goldsboro Lumber Company, and was plaintiff's intestate in the employ of said independent contractor at the time of his injury, and death? Answer: Yes.

"2. Was the plaintiff's intestate killed by the negligence of Goldsboro Lumber Company, as alleged in the complaint? Answer: Yes.

"3. Did the plaintiff's intestate, by his own negligence contribute to his injury and death as alleged in the answer? Answer: No.

"4. What damages, if any, is plaintiff entitled to recover of the defendant? Answer: $2,500.00."

Many exceptions and assignments of error were made by defendant. There was a judgment on the verdict and appeal taken to the Supreme Court. Other material facts will be stated in the opinion.

N. E. Day and Cowper, Whitaker & Allen for plaintiff.
Bailey & Warlick and T. D. Warren for defendant.

CLARKSON, J. The jury found that L. L. Paderick was an independent contractor and the plaintiff's intestate, Willie Paderick, was in his employ at the time of his death.

It is contended by defendant that the proofs do not correspond with the allegations. This is true in part, but not to such a material extent, under our liberal practice, that it would be reversible error; especially is this so on the theory on which the case was tried in the court below. The first issue being found that L. L. Paderick was an independent contractor, the serious matters for our consideration are: What duty, if any, did defendant owe the plaintiff's intestate? If he owed a duty, was the failure in the performance of that duty negligence, and was that negligence the proximate cause of plaintiff's intestate's injury? Did plaintiff's intestate contribute to his own injury? The main assignment of error is to the refusal of the court below to sustain the defendant's motion of nonsuit at the close of plaintiff's evidence and at the close of all the evidence.

The evidence, taken in the light most favorable to plaintiff, tended to show that the defendant was in the lumber business. It owned the lumber in the woods. It employed L. L. Paderick to get the lumber out of the woods and paid him $3.00 a thousand feet for the lumber loaded on the defendant's cars. L. L. Paderick employed plaintiff's intestate and other help. Defendant had a railroad with cars on which the lumber was loaded to be transported in the course of its business to its manufacturing plant. The defendant furnished L. L. Paderick the "skidder" or "loader," hereafter termed loader, to place the logs on its cars for transportation. The loader that defendant furnished, it was contended, was defective—out of repair. This was called to the attention of the defendant's foreman in the woods, and it is contended that he promised a short time before plaintiff's intestate was killed to

repair it—this was not done. In operating the loader in a careful manner, on account of its defective condition, it caused the log being placed to roll and veer and strike a small cypress tree about thirty feet high and it was whipped down on plaintiff's intestate, who was standing nearby, and killed him.

Under the facts and circumstances of this case, defendant having agreed with L. L. Paderick to furnish the loader, in so far as L. L. Paderick and those in his employ are concerned, in the operation of the loader, the principle of master and servant was applicable. It was then the duty of the defendant, as was said in *Riggs v. Mfg. Co., ante,* p. 258: "That an employer of labor, in the exercise of reasonable care, must provide for his employees a safe place to do their work and supply them with machinery, implements, and appliances safe and suitable for the work in which they are engaged, and to keep such implements, etc., in safe condition as far as this can be done by the exercise of proper care and supervision," citing numerous authorities. 14 Enc. Dig. of N. C., sec. 42, p. 761.

We think on this aspect of the case that the learned judge who tried this cause in the court below carefully followed the principles of law herein set forth, and charged the jury substantially in the language of the decisions of this Court. As to the defect in the loader, a disputed fact, this was left to the jury.

The defendant contends that if it was negligent, its negligence was not the proximate cause of the injury. Proximate cause has been recently discussed in *Whitehead v. Telephone Co., ante,* 197. The facts in that case are different from those in the present case.

The defendant further contends that the injury was accidental or improbable, not the natural and probable result of the act if caused by the negligence of defendant. After a careful review of the authorities cited, we cannot so hold. The principle laid down in *Ridge v. R. R.,* 167 N. C., 525, is thus stated: "Where the master's negligence contributes to the result, although there may be a coöperating cause not due to the servant's act, the law will not undertake to apportion the liability, but will hold him responsible to the servant in the same degree and with the same consequences as if his negligence had been the sole cause of the injury. *Steele v. Grant,* 166 N. C., 635; *Wade v. Contracting Co.,* 149 N. C., 177. As said in the oft-cited case of *Kellogg v. R. R.,* 94 U. S., 469, 475, 'The inquiry must, therefore, always be whether there was any intermediate cause *disconnected* from the primary fault, and *self-operating,* which produced the injury.' In this case there was no intermediate, or intervening, independent and efficient cause, which, operating alone, was sufficient of itself to break the connection between defendant's negligence and the injury, and the

primary wrong must be considered as reaching from the beginning to the effect, and, therefore, as proximate to it. *Hardy v. Lumber Co.*, 160 N. C., at pp. 124, 125; *Kellogg v. R. R., supra: Ins. Co. v. Boon*, 95 U. S., 619. The windstorm would not, of itself, have caused the injury, as the testimony shows, when viewed favorably for the plaintiff; but it required the concurrence and coöperation of the defendant's negligence in having a defective car to produce the disastrous result." *Lamb v. R. R.*, 179 N. C., 622-623; *Davis v. Shipbuilding Co.*, 180 N. C., 76; *Page v. Mfg. Co., ibid.*, 334; *Tatham v. Mfg. Co., ibid.*, 629; *Saunders v. R. R.*, 185 N. C., 290; *Mangum v. R. R.*, 188 N. C., 695. Under the facts here, the effect was the natural and probable result and sequence of the cause—the defective loader. In fact, several anticipated the result, it was foreseen and called to defendant's foreman's attention to make repair, but of no avail. The consequences defendant should not now complain of—warning and notice were given it of the defective loader and it knew the place in which it was being operated and the surroundings. In fact, at the request of the defendant, this was left to the jury to determine in the prayer for instructions asked by defendant: "Unless you find that the defects of the skidder complained of and testified to were the proximate cause of the injury to, and death of (Willie) J. W. Paderick, you would answer second issue 'No,' and fourth issue 'Nothing.'"

The question of contributory negligence was left to the jury under proper instructions. The "less insurance" controversy, from the findings of the jury on the first issue, was in no way prejudicial—perhaps, it was competent on that issue. The record shows that the objection by defendant was sustained. There was no request by defendant to caution the jury—if error, it is too late now to complain.

The pathos of the case—a witness testified: "Willie Paderick was unmarried, lived with his mother, was twenty-three years old at the time of his death, received $2.00 a day. As to his habits for sobriety, he was like me, just a hard-working man and tried to take care of his mother. He was sober and in good health and used his money on his home and his mother."

From a careful review of the whole case, we can find no prejudicial or reversible error.

No error.

VARSER, J., not sitting.

MARY NEWTON LUNCEFORD, ADMINISTRATRIX OF ADEN P. LUNCEFORD, DECEASED, v. THE COMMERCIAL TRAVELERS MUTUAL ACCIDENT ASSOCIATION OF AMERICA.

(Filed 21 October, 1925.)

1. Comity—Foreign Corporations—Conditions—Statutes.

A corporation of one state may do business in another only by comity of the latter state, when not so permitted by a valid Federal statute, as in matters of interstate commerce, and may be prohibited from doing business therein entirely, or upon conditions made a prerequisite by statute.

2. Same—Commerce—Insurance—Process—Summons.

The insurance business is not regarded as "commerce" within the intent and meaning of the law, and where foreign corporations do business in North Carolina, they impliedly accept the conditions of C. S., 483, that they must keep process agents within our jurisdiction subject to the process of our courts, and that summons in an action may be served on them by leaving a copy of the original with the Secretary of State as the statute directs.

3. Same—"Doing Business."

A foreign company acquiring membership of persons in North Carolina for life insurance, without soliciting agents to whom policies are issued upon a mutual benefit plan and kept in force by the payments of dues, is doing a life insurance business here in contemplation of C. S., 483, and valid service of summons may be had on such corporation upon compliance with its provisions in respect thereto.

APPEAL by defendant from *Barnhill, J.*, at August Term, 1925, of DUPLIN.

Civil action to recover the amount of an insurance policy issued by defendant to plaintiff's intestate, A. P. Lunceford.

The defendant, through its counsel, entered a special appearance and moved to dismiss the action for want of proper service. Motion overruled; exception and appeal.

Oscar B. Turner for plaintiff.
Gavin & Boney for defendant.

STACY, C. J. It is conceded that the defendant is a foreign corporation, without process agent, property, or license to do business in this State. Service of summons is sought to be obtained under C. S., 1137, by leaving a true copy thereof with the Secretary of State and having him mail the copy to the president, secretary or other officer of the corporation, upon whom, if residing in this State, service could be made, it being alleged that the defendant is doing business in this State without complying with the provisions of said section.

The statute provides that every corporation having property or doing business in this State, whether incorporated under its laws or not, shall have an officer or agent in the State upon whom process in all actions or proceedings against it can be served. A corporation failing to comply with the provisions of this section is liable to a forfeiture of its charter, or to the revocation of its license to do business in the State. In the latter event (failing to comply with the provision requiring the presence of a process officer or agent in this State), process in an action or proceeding against the corporation may be served upon the Secretary of State by leaving a true copy thereof with him, and he shall mail a copy to the president, secretary or other officer of the corporation upon whom, if residing in this State, service could be made. And in case of foreign corporations doing business in this State without complying with the provisions of said section, we have held that valid service of process may be had under this statute in the manner indicated, as well as on officers and agents of such corporations under the general provisions of C. S., 483, construed in *Whitehurst v. Kerr,* 153 N. C., 76, and other cases. See *Anderson v. Fidelity Co.,* 174 N. C., 417; *Currie v. Mining Co.,* 157 N. C., 209; *Fisher v. Ins. Co.,* 136 N. C., 217.

The reason for such legislation is cogently stated in *Corbett v. Physicians' Casualty Assn.,* 135 Wis., 505, 115 N. W., 365, 16 L. R. A. (N. S.), 177, where the Court, in dealing with a different but somewhat similar statute, said: "The dominant purpose of such a statute is to protect residents of the State from being imposed upon by foreign insurance companies. In case any such company offers to do business with one within such protection, it holds itself out as having qualified to do such business, and the resident, in the absence of knowledge, actual or constructive, to the contrary, may safely act upon the faith thereof."

The defendant controverts neither the law nor our decisions on the subject, but says that it is not doing business in this State and, therefore, it is not subject to any of our statutes relating to service of process.

Touching the question as to whether the defendant is "doing business in this State," within the meaning of the statute now before us, the following facts were found by the trial court and embodied in its judgment:

"(b) Section three of article one of defendant's by-laws reads as follows: 'Sec. 3. The object of this association is to secure for its members, upon a coöperative basis, the very best accident insurance at the least possible cost.' And section 6 of article XIII of said by-laws reads as follows: 'Sec. 6. Every member of this association shall be entitled to one vote at all elections of officers and upon all questions that may

be voted upon at any and all regular or special meetings of the association or adjournments thereof, and to cast the same either in person or by proxy.' In its application blanks, to be used when application is made for insurance, defendant describes itself as 'a mutual organization—no branch offices—no stockholders—no agents.' In the affidavit of Russell H. Wicks, president of defendant, it is said that defendant never has had, and it does not now have any paid agents, servants or employees to solicit membership or insurance anywhere. . . .

"(c) Defendant issues and delivers contracts of insurance to residents of this State and collects from those insured by it in this State the annual dues and assessments agreed to be paid by the insured. An application of a resident of this State to defendant for insurance is dated at the postoffice address of the resident applicant, is also signed by the resident applicant, and the applicant is recommended by a resident already insured by defendant and called a member of defendant's association. The application is signed by the member who recommended the applicant, and the acceptance of the application also shows the postoffice address of such recommending member, and if and when a certificate or contract of insurance is issued and delivered to the applicant upon such application the contract of insurance so issued and delivered makes the application therefor a part of the said contract of insurance.

"(d) In September, 1914, defendant issued and delivered to A. P. Lunceford, plaintiff's intestate, the contract of insurance sued on in this action. At that time the said A. P. Lunceford was a resident of Duplin County, North Carolina, residing at Rose Hill, N. C., where he continued to reside until he died, in April, 1925."

Upon the foregoing findings, the court concluded and adjudged that the defendant was doing business in this State, within the meaning of the statute above mentioned, and that summons duly served on the Secretary of State and mailed by him to the president, secretary or other officer of the corporation, as provided in said section, was sufficient to bring the defendant into court. In this we think there was no error.

Speaking generally to the question in *Anderson v. Fidelity Co.*, 174 N. C., p. 419, *Hoke, J.* (later *Chief Justice*), said:

"Authoritative cases on the subject are to the effect, further, that when a State by its statutes has established and provided a method of personal service of process on foreign corporations doing business therein, one that is reasonably calculated to give full notice to such companies of the pendency of suits against them, these provisions are to be regarded as conditions on which they are allowed to do business within the State, and when they afterwards come into the State and enter on their business they are taken to have accepted as valid the statutory method

provided, and such a service will be held to confer jurisdiction. *St. Clair v. Cox,* 106 U. S., 350-356; Beale on Foreign Corporations, secs. 74 and 266.

"In citation to Beale, sec. 266, it is said: 'The consent to be sued may be implied from the conduct of the foreign corporation. If the law of the State provides that a foreign corporation doing business in the State shall be liable in its courts after process served in a prescribed manner, this is to be regarded as the expression of the will of the State that a foreign corporation shall do business in the State only on condition that it consent to be sued,' etc."

It is well settled that the right of a foreign corporation to engage in business within a state, other than that of its creation, is a privilege accorded by such other state, which it may grant freely or upon condition or withhold altogether at its pleasure, unless some federal principle is violated, such as interfering with interstate commerce; but doing an insurance business is not engaging in "commerce" within any proper meaning of that term as used in the Constitution of the United States. *Hooper v. California,* 155 U. S., 648. "Except in matters of interstate commerce, a state may undoubtedly prescribe the conditions on which a foreign corporation shall be permitted to do business within it, and may include therein a provision with regard to the service of process on its agents. *Lafayette Ins. Co. v. French,* 18 How. 404, 15 L. Ed., 451. Where, therefore, a foreign corporation does business in such state, it will be presumed to have assented to these terms." *Frawley v. Pa. Cas. Co.,* 124 Fed., p. 262.

In *St. Clair v. Cox,* 106 U. S., 350, *Mr. Justice Field* deals with the question in the following manner:

"A corporation of one state cannot do business in another state without the latter's consent, express or implied, and that consent may be accompanied with such conditions as it may think proper to impose. As said by this Court in *Lafayette Insurance Co. v. French,* 'These conditions must be deemed valid and effectual by other States and by this Court, provided they are not repugnant to the Constitution or laws of the United States, or inconsistent with those rules of public law which secure the jurisdiction and authority of each State from encroachment by all others, or that principle of natural justice which forbids condemnation without opportunity for defense.' 18 How. 404, 407; *Paul v. Virginia,* 8 Wall., 168

"The State may, therefore, impose as a condition upon which a foreign corporation shall be permitted to do business within her limits, that it shall stipulate that in any litigation arising out of its transactions in the State, it will accept as sufficient the service of process on its agents or persons specially designated; and the conditions would be

eminently fit and just. And such condition and stipulation may be implied as well as expressed. If a State permits a foreign corporation to do business within her limits, and at the same time provides that in suits against it for business there done, process shall be served upon its agents, the provision is to be deemed a condition of the permission; and corporations that subsequently do business in the State are to be deemed to assent to such conditions as fully as though they had specially authorized their agents to receive service of the process."

It is freely conceded, however, that a foreign corporation, having neither property nor process agent in this State and not having domesticated in North Carolina, must be engaged in business within the State in order to give our courts jurisdiction over it. *Goldey v. Morning News,* 156 U. S., 518.

While the extent to which a foreign corporation must be doing business in a state in order to justify the service of process upon it under the laws of that state is not clearly defined, "it is sufficient if it is doing business therein," says *Mr. Justice Day* in *Com. Mut. Accident Co. v. Davis,* 213 U. S., 245. See, also, 2 Words & Phrases, 108 *et seq.*

The cases of *Pennoyer v. Neff,* 95 U. S., 714; *Wilson v. Seligman,* 144 U. S., 41, and *Bridger v. Mitchell,* 187 N. C., 374, are not in point. They rest upon another principle. In *Insurance Co. v. Spratley,* 172 U. S., 602, the Court said: "It was held in *Pennoyer v. Neff,* 95 U. S., 714, that a service by publication in an action *in personam* against an individual, where the defendant was a nonresident and had no property within the state, and the suit was brought simply to determine his personal rights and obligations, was ineffectual for that purpose. The case has no bearing upon the question here presented." Moreover, it was expressly held in *Pennoyer v. Neff, supra,* that a state, if it cared to exercise the power, could require, not only a foreign corporation, but also a nonresident individual, making contracts within its borders, to appoint a resident agent upon whom service of process could be had. *Fisher v. Ins. Co., supra.* It is settled by all the authorities that a corporation can carry on its business in a state other than that of its creation only by comity, or as an act of grace on the part of that state, and the condition upon which the favor is extended goes with it, and cannot be separated from it, so that if the privilege be enjoyed the condition must be performed. "The insurance business, for example, cannot be carried on in a state by a foreign corporation without complying with all the conditions imposed by the legislature of that state," and the law is the same as to any other corporation not engaged in business belonging to the regulating power of Congress. *Crutcher v. Kentucky,* 141 U. S., 47.

The only question presented by the appeal is whether the defendant, foreign corporation, is doing business in this State, within the meaning

of C. S., 1137. The trial court found, upon ample evidence, that the business carried on by the defendant in this State was such as to bring it within the terms of the statute, rendering it liable to service of process in the manner prescribed therein. In this, we find no error. A statute of Oklahoma with provisions substantially the same as those incorporated in the act now before us, and on a similar state of facts, was upheld in *Naill v. Commercial Travelers, etc.*, 229 Pac., 833.

The order appealed from, must be

Affirmed.

STATE v. MACK CARIVEY.

(Filed 21 October, 1925.)

1. Criminal Law—Escape—Statutes.

Where a prisoner has been lawfully confined in a jail, and by the aid of one on the outside succeeds during the night in breaking through and leaving his cell but remains within the outside corridor of the jail until found by the officers of the law, a legal escape had not been effected.

2. Same—Indictment—Attempt.

Where the bill of indictment charges that the defendant gave assistance to one in lawful confinement by a direct ineffectual act done towards the commission, with intent to effect his escape, and by explicit language shows an attempt to rescue, the word "attempt" need not be set out in the indictment.

3. Same.

An attempt to commit a crime is an indictable offense. The indictment charges an attempt to rescue.

APPEAL from *Devin, J.*, and a jury, at June Term, 1925, of HALIFAX. No error.

Defendant was convicted and sentenced under the following bill of indictment, and appealed to the Supreme Court:

"The jurors for the State, upon their oath, present, that on the 11th day of January, 1925, at Roanoke Rapids, in said county, one W. D. Johnson was undergoing lawful imprisonment in the common jail to await his trial on the charge of operating an automobile, while under the influence of intoxicating liquor, upon the public highways of said county; whereupon Mack Carivey and Richard Savage, late of Halifax County, on the 11th day of January, 1925, at and in the county aforesaid, did then and there well knowing these premises and with the intent that the said W. D. Johnson should elude justice

and escape out of the said jail, and go at large, unlawfully, wilfully and feloniously enter the outside door of said jail and remove the levers which were used to fasten the doors enclosing and confining the prisoners in said jail, against the form of the statute in such case made and provided, and against the peace and dignity of the State.

R. HUNT PARKER, *Solicitor.*"

The State's evidence was, in substance: "One Dudley Johnson was confined in the town jail of Roanoke Rapids under proper papers charging him with driving an automobile while intoxicated. The jail was the city lock-up at Roanoke Rapids. It consisted of an outer wall of brick and an inner defense of steel, which was separated from individual cells by an interval which is called a hall in the case. There was a door entering the brick wall and then a door which opened through the steel defense into the hall, and then doors to each individual cell. The defendant in this appeal went with Richard Savage on the night of 11 January, 1925, to this place with the intention to get Dudley Johnson out. Savage had with him a key which unlocked the outer door and he and the defendant entered the jail there. They could not, however, open the door to the steel enclosure. After working with it for a while and finding they could not, they reached in and moved the lever so that Johnson could come out of his individual cell into the hall, leaving him, Johnson, however, confined within the limits of the steel enclosure. When the officers went to the lock-up the next morning, they found Johnson in this hall and out of his cell. Upon their asking an explanation, he accounted for his being out of the cell as stated herein."

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

Travis & Travis for defendant.

CLARKSON, J. The defendant in his brief says: "There was only one exception, and that was to the sufficiency of the bill of indictment. After verdict the defendant moved in arrest of judgment on the ground that the bill of indictment does not sufficiently charge defendant with the crime of 'Escape,' and does not sufficiently charge defendant with any crime under the law. . . . Clearly this bill does not charge an escape. It does not charge that there was an escape, and in fact there was none."

In 2 Bishop on Criminal Law, 9 ed. (1923), sec. 1065, subsec. 3, it is said: "The word 'escape' has two separate meanings in the law. One is the allowing, voluntarily or negligently, of a prisoner lawfully

in custody to leave his confinement. The other is the going away, by the prisoner himself, from his place of lawful custody, without a breaking of prison."

In *S. v. Ritchie,* 107 N. C., p. 858, it is said: "An escape is defined—'when one who is arrested gains his liberty before he is delivered in due course of law.' 1 Russ. Crimes, 467. And by another eminent authority, tersely, as 'the departure of a prisoner from custody.' 2 Whart. Cr. L., sec. 2606. These definitions are cited and approved by *Smith, C. J.,* in *S. v. Johnson,* 94 N. C., 924."

We do not think the bill charges an escape. The only question for our decision, under the bill of indictment and evidence, is: Has defendant been convicted of any crime?

It is said, *In re Westfeldt,* 188 N. C., p. 709: "The charge of the court not appearing in the record, it is to be presumed that the court below charged the law in accordance with the evidence."

The crime is not prison breach—that is defined in 2 Bishop, *supra,* sec. 1065, subsec. 1, as follows: "Prison breach is a breaking and going out of prison by one lawfully confined therein."

C. S., 4404 declares: "If any person shall break prison, being lawfully confined therein, or shall escape from the custody of any superintendent, guard or officer, he shall be guilty of a misdemeanor."

We think the crime of which defendant is charged, and of which he has been convicted is an attempt to commit the crime of rescue. Rescue is defined in 2 Bishop, *supra,* 1065, subsec. 2: "Rescue is a deliverance of a prisoner from lawful custody by any third person."

If there had been a deliverance of the prisoner by defendant he would have been guilty of rescue, as the prisoner, by the admitted evidence, was in lawful custody.

C. S., 4640 is as follows: "Upon the trial of any indictment the prisoner may be convicted of the crime charged therein or of a less degree of the same crime, or of an attempt to commit the crime so charged, or of an attempt to commit a less degree of the same crime." *S. v. Kline, ante,* p. 180.

Here, then, was an attempt to commit a crime amounting to a rescue, and C. S., 4640 permits the jury to convict a prisoner of a less degree of the same crime or of an attempt to commit the crime charged in the bill of indictment.

Hoke, J., in *S. v. Addor,* 183 N. C., p. 688, said: "An attempt to commit a crime is an indictable offense, and as a matter of form and on proper evidence, in this jurisdiction, a conviction may be sustained on a bill of indictment making the specific charge, or one which charges a completed offense. *S. v. Colvin,* 90 N. C., 718; C. S., 4640. In 3 A. & E., p. 250, an unlawful attempt to commit a crime is defined

as an act done in part execution of a criminal design, amounting to more than mere preparation, but falling short of actual commission and possessing, except for failure to consummate, all the elements of the substantive crime; and in 16 Corpus Juris, at p. 113, it is said that an unlawful attempt is compounded of two elements: First, the intent to commit it; and, second, a direct, ineffectual act done towards its commission." The learned *Justice* in the *Addor case* cites abundant authority and reasoning to sustain the position. 1 Cyc. Criminal Law (Brill, 1922), sec. 146.

The language of the bill of indictment used the word "intent," and the facts set out show an "attempt" without using the word. The words in the bill *ex vi termini* necessarily import an attempt to commit the crime of rescue, and are amply sufficient to give the defendant full notice of the crime with which he stands charged, and that is the chief purpose of the bill of indictment. We think this principle is borne out in *S. v. Hewett,* 158 N. C., p. 629, at least not in conflict with it.

C. S., 4623 is as follows: "Every criminal proceeding by warrant, indictment, information, or impeachment is sufficient in form for all intents and purposes if it express the charge against the defendant in a plain, intelligible, and explicit manner; and the same shall not be quashed, nor the judgment thereon stayed, by reason of any informality or refinement, if in the bill or proceeding, sufficient matter appears to enable the court to proceed to judgment."

"Form, technicality and refinement have given way to substance, and it is sufficient if the indictment contains the charge in a plain, intelligent, and explicit manner. *S. v. Leeper,* 146 N. C., 655; *S. v. Hedgecock,* 185 N. C., 714; *S. v. Hawley,* 186 N. C., 433." *S. v. Switzer,* 187 N. C., 96; *S. v. Jarrett,* 189 N. C., 520.

From the record we find

No error.

STATE v. H. L. EDWARDS.

(Filed 21 October, 1925.)

1. Criminal Law—Worthless Checks—Indictment—Demurrer—Banks and and Banking.

In order to charge a statutory offense under the criminal law, the indictment should set forth all the essential requisites therein prescribed, and no element should be left to inference or implication, and where the indictment is defective a demurrer is good.

2. Same—Indictment.

In order for an indictment to be sufficient to charge the unlawful giving of a check upon a bank under the act of 1925, it is required that

the charge not only be made that the maker of the check had insufficient funds on deposit there to meet the check, but among other things the indictment must charge that he had insufficient credits, etc., as the statute provides, and this provision is not affected by the prerequisite that the maker should have had the ten days notice, etc.

APPEAL by the State from *Daniels, J.*, at July Term, 1925, of HERTFORD.

The indictment charges: That H. L. Edwards, late of the county of Hertford, on the 1st day of March, in the year of our Lord one thousand nine hundred and twenty-five, at and in the county aforesaid, did unlawfully and wilfully draw and deliver to C. E. Myers & Co. a check signed by the said H. L. Edwards and drawn on a bank for the payment of money, and the said H. L. Edwards at the time of delivering said check had insufficient funds on deposit in said bank with which to pay said check upon its presentation, and the said H. L. Edwards unlawfully and wilfully did fail to provide said funds for the payment of said check upon its presentation, and further the said H. L. Edwards unlawfully and wilfully did fail to provide said funds for the payment of said check upon its presentation within ten days after written and verbal notice of nonpayment of said check, against the form of the statute in such case made and provided and against the peace and dignity of the State.

The defendant filed the following demurrer: "The defendant demurs to the bill of indictment in this action and avers that allegations and the count therein set up no crime or misdemeanor indictable under the laws of North Carolina, or the commission of any offense against the said State, for that chapter 14, Public Laws of North Carolina, Session 1925, known as the Worthless Check Act, violates and is repugnant to: First, Article I, section 16, of the Constitution of North Carolina; Second, Amendment XIV, section 1, of the Federal Constitution; and, Third, that the bill of indictment contains no allegation that the defendant failed to provide credits for the payment of the check set out in said bill.

The demurrer was sustained and the defendant discharged. The State excepted and appealed. C. S., 4649.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

Lloyd J. Lawrence for defendant.

ADAMS, J. Archbold defines a demurrer as a pleading by which the legality of the last preceding pleading is denied and put in issue;

and he says it is pleaded either to the indictment or to a special plea. Cr. Pr. & Pld., 354; *S. v. Moody,* 150 N. C., 847. The office of a demurrer is to take advantage of defects in substance or in form which appear upon the face of the indictment, thereby forestalling a prosecution on the ground that the charges do not constitute a breach of the criminal law; and the issue thus joined is to be determined by the court.

If the present indictment is defective upon its face the demurrer must be sustained without regard to the question whether the act prohibiting the giving of worthless checks is or is not constitutional. Laws 1925, ch. 14. That it is defective hardly admits of serious doubt. Where a statutory offense is charged the indictment should set forth all the essential requisites prescribed by the statute and no element should be left to inference or implication. Accordingly it was said in *S. v. Liles,* 78 N. C., 496: "Where the words of a statute are descriptive of the offense, the indictment should follow the language and expressly charge the described offense on the defendant, so as to bring it within all the material words of the statute"; and in *S. v. Mooney,* 173 N. C., 798: "It is well recognized that in indictments on a statute the essential words descriptive of the offense or their just equivalent must be given, and when the terms used have acquired a technical significance, for which there is no just equivalent, such words must be given with exactness. The correct position is very well stated in Clark's Cr. Procedure, as follows: 'It is generally necessary, subject to exceptions which we shall explain, not only to set forth all the facts and circumstances which go to make up the offense as defined in the statute, but also to pursue the precise and technical language of the statute in which they are expressed. If the words are technical and have no equivalent, it is well settled that no others can be substituted for them, for no others are exactly descriptive of the offense.'" This principle has been upheld in a number of our decisions. *S. v. Bragg,* 86 N. C., 688; *S. v. Merrilt,* 89 N. C., 506; *S. v. Deal,* 92 N. C., 802; *S. v. Hall,* 93 N. C., 571; *S. v. Bagwell,* 107 N. C., 859.

The material parts of the act of 1925, ch. 14, are as follows:

"Section 1. Any person, firm or corporation who shall draw and deliver to another any check or draft signed or purporting to be signed by such person, firm or corporation, and drawn on any bank or depository for the payment of money or its equivalent, and who shall at the time of delivering any such check or draft, as aforesaid, have insufficient funds on deposit in or credits with such bank or depository with which to pay such check or draft upon its presentation and who shall fail to provide such funds or credits for the payment of such check or draft upon its presentation, or within ten days after written or verbal notice

of nonpayment, shall be guilty of a misdemeanor and shall be fined or imprisoned in the discretion of the court.

"Sec. 2. That the word 'credits' as used herein shall be construed to be an arrangement or understanding with the bank or depository upon which such check or draft is drawn for the payment of such check or draft upon its presentation."

An inspection of the statute will show that several elements enter into the constitution of the offense. There must be evidence (1) that the person charged has drawn and delivered to another a check or draft signed or purporting to be signed by him, and (2) drawn on a bank or depository for the payment of money or its equivalent; (3) that such person at the time of delivering the check or draft had insufficient (a) funds on deposit in or (b) credits with the bank or depository to pay the paper upon its presentation; and (4) that such person has failed to provide such funds or credits for the payment of the paper as provided by the statute—that is, (c) upon presentation or (d) within ten days after written or verbal notice of nonpayment.

It will readily be seen, therefore, that the indictment must charge both "insufficient funds" and "insufficient credits"; for though the funds on deposit may be insufficient, the "credits"—"the arrangement or understanding with the bank or depository"—may be amply sufficient to protect the check or draft upon its presentation. The indictment is fatally defective in that, while charging "insufficient funds on deposit" it makes no reference whatever to a want of credits; and the defect is not cured by the clause which affords the drawer an opportunity to provide funds or credits for payment upon presentation of the check or draft or within ten days after notice of nonpayment.

The act of 1907, ch. 975, C. S., 4283 (the original worthless check act), provides: "Every person who, with intent to cheat and defraud another, shall obtain money, credit, goods, wares or any other thing of value by means of a check," etc. In the act of 1925 there is no requirement that the check shall be given for value presently received, the language being sufficiently comprehensive to include a check or draft drawn to cover a past indebtedness. It is suggested in the appellant's brief that a proper construction requires the interpolation in the latter act of the words "for value" or their equivalent, as used in the former; but this question we need not consider for the reason that neither these words nor their equivalent may be found in the indictment.

The judgment is

Affirmed.

L. E. HALL, TRUSTEE, v. C. E. QUINN, HENRY FARRIOR AND EMMA BLOUNT.

(Filed 21 October, 1925.)

1. Estates—Deeds and Conveyances—Condition Subsequent.

Conditions subsequent that may defeat the title to lands granted are not favored by the law, and will be strictly construed to effectuate the intention of the parties as therein expressed, and ordinarily require a defeasance clause or one of re-entry upon the breach of the condition.

2. Same—Religious and Charitable Purposes.

Where land is granted to trustees to hold for a religious denomination in trust for the purposes of a school, it will not be declared a condition subsequent, the breach of which will divest the title without other words that will by proper construction evidence the intention of the parties that it would be so regarded.

3. Same—Mortgages.

Where lands are conveyed to the trustees of a religious denomination to be held for school purposes, without other indication that this was a condition subsequent, the trustees or other successors having the authority to do so, may execute a valid mortgage on the lands.

APPEAL by defendants from *Daniels, J.*, at July Term, 1925, of DUPLIN, upon facts agreed.

In August, 1897, Henry Farrior and Amelia, his wife, and James W. Blount and Maria, his wife, conveyed to the trustees of the James Sprunt Institute a lot of land in Duplin County "to be used for the purposes of education, and for no other purposes." The deed was duly registered. The institution was located at Kenansville and was owned and controlled by the Wilmington Presbytery. Henry Farrior and James W. Blount were two of the trustees chosen by the Presbytery in April, 1896. At the request of the trustees the institution was incorporated by the Legislature of 1901. Pri. Laws 1901, ch. 370. In sec. 4, Henry Farrior is named as secretary and J. W. Blount as treasurer. The latter continued to serve until his death in 1903. Sec. 3 is as follows:

"The said corporation by its name and style aforesaid shall on behalf of the Presbytery of Wilmington have, hold, use and enjoy, succeed to all the estates, titles, properties and possessions now held and possessed by the institution of the same name, and all rights, titles, estates and property in and to the same is hereby vested both by law and in equity in the same, and further, the said corporation shall have power to acquire, hold, receive, take and possess on behalf of said Presbytery of Wilmington all property, real, personal or mixed, dona-

tions, gifts, devises and bequests, and to use and enjoy, alien, exchange, invest, convert and reinvest all of its property and assets in as full and ample manner as other institutions of the State similarly chartered, and in no greater degree."

On the first day of August, 1906, by resolutions duly and properly passed by its trustees and by resolutions duly passed by the Wilmington Presbytery authorizing said trustees and the said corporation to execute a mortgage, all of which is admitted to be in proper and regular form, the James Sprunt Institute executed a deed of trust to H. F. Pierce, trustee, to secure certain bonds therein described, which said deed of trust is registered in Book 95, p. 565, of the office of the Register of Deeds of Duplin County, and the money secured by said bonds was used for school purposes and for no other purpose.

Dr. James W. Blount, Sr., died during the year 1903, prior to the execution of the mortgage described in paragraph 4. But Henry Farrior was living and as a trustee voted for the resolution approving the mortgaging of the property, and purchased some of the bonds secured by said mortgage.

Default was made in the payment of said bonds secured by said deed of trust, and the bondholders demanded of the trustees the foreclosure of the said deed of trust, and the said trustees offered the said property described in said deed of trust for sale to the highest bidder for cash at public auction at the courthouse door in Duplin County on Monday, 2 June, 1919, at 12 o'clock, noon, and Jas. J. Bowden became the last and highest bidder for said property at the price of $5,000, and he assigned his bid to L. E. Hall, trustee, and plaintiff herein paid the purchase price, and said H. F. Pierce thereupon executed a deed to the said L. E. Hall, trustee, conveying the land and certain personal property.

Thereafter on 17 September, 1923, L. E. Hall, trustee for the Wilmington Presbytery and for the use of Grove Institute, which was controlled by the Presbytery, authorized L. E. Hall to make an agreement with C. E. Quinn by which Quinn, having paid $50 should pay $9,950 more at his option—it being agreed that even if he should exercise his option he should not be required to pay the purchase price unless the title should be accepted as good or so determined by a court of competent jurisdiction. On 24 January, 1924, L. E. Hall, trustee, tendered to Quinn a deed sufficient in form to convey the property and Quinn declined to accept it and pay the purchase money.

The said property has not been used by the Wilmington Presbytery for educational purposes since the scholastic year of 1922 and 1923, and in the event of a sale thereof, as contemplated herein, the prop-

erty will pass into private hands to be used for private purposes, with no guarantee that it will be used for educational purposes.

Judge Daniels was of opinion that the deed tendered by the plaintiff to Quinn was sufficient to convey a good and indefeasible title in fee, free from all trusts and equities, and gave judgment decreeing that the contract of purchase be specifically performed and that the defendant upon the plaintiff's tender of the deed pay the remainder of the purchase price, which is $9,950, and the costs. The defendants excepted and appealed.

Stevens, Beasley & Stevens for plaintiff.
H. D. Williams, F. E. Wallace and R. D. Johnson for defendants.

ADAMS, J. It is necessary to keep in mind certain clauses in the deed executed in 1897 by Henry Farrior and James W. Blount to the trustees of the James Sprunt Institute. In the premises it is said that the grantors desired to establish and provide for this institution, which was a high school in the town of Kenansville, and that the Wilmington Presbytery had elected trustees by whom it was to be managed and controlled. Following the premises is the clause of conveyance to the "trustees and their successors in trust for the Wilmington Presbytery to be used for the purposes of education." And then the habendum—"to the said trustees, their successors and assigns in trust for the only use and benefit of the Wilmington Presbytery forever, and to be used for the purposes of education and for no other purposes."

The initial question relates to the quality of the estate described in this conveyance. The plaintiff contends that the deed passes to the trustees a fee simple, with the usual covenants of warranty, while the defendants contend that it conveys an estate in trust defeasible upon breach of a condition subsequent appearing upon the face of the instrument.

An estate on condition expressed in the grant itself is where an estate is granted, either in fee simple or otherwise, with an express qualification annexed, whereby the estate granted shall either commence, be enlarged, or be defeated, upon performance or breach of such qualification or condition; and a condition subsequent operates upon an estate already created and vested, rendering it liable to be defeated if the condition is broken. 2 Bl., 154. "Among the forms of expression which imply a condition in a grant," says Washburn, "the writers give the following: 'on condition'—'provided always'—'if it shall so happen'—or 'so that he, the grantee, pay, etc., within a specified time'; and grants made upon any of these terms vest a conditional estate in

the grantee. And it is said other words make a condition if there be added a conclusion with a clause of re-entry, or without such clause, if they declare that, if the feofee does or does not do such an act, his estate shall cease or be void." 2 Wash. Real Prop., 5 ed., 3.

The deed to the trustees contains none of these "forms of expression"; no clause of re-entry; no forfeiture of the estate upon condition broken. *Brittain v. Taylor,* 168 N. C., 271; *Church v. Young,* 130 N. C., 8. So whether it includes a condition subsequent depends upon the intention of the parties as shown by a proper construction of the language used. "Conditions subsequent are not favored by the law, and are construed strictly, because they tend to destroy estates, and the rigid execution of them is a species of *summum jus,* and in many cases, hardly reconcilable with conscience." 4 Kent's Com. (12 ed. 129); *Church v. Bragaw,* 144 N. C., 126; *Hinton v. Vinson,* 180 N. C., 393. A clause in a deed will not be construed as a condition subsequent unless it expresses in apt and appropriate language the intention of the parties to this effect (*Braddy v. Elliott,* 146 N. C., 578) and a mere statement of the purpose for which the property is to be used is not sufficient to create such condition. *Hunter v. Murfee,* 126 Ala., 123; *Fitzgerald v. Modoc County,* 44 L. R. A. (N. S.), (Cal.), 1229; *Wright v. Board of Education,* 152 S. W., 543; *Forman v. Safe & Trust Co.,* 80 At. (Md.), 298; *Brown v. Caldwell,* 48 A. R. (W. V.), 376; *Highbee v. Rodeman,* 28 N. E. (Ind.), 442; *Raley v. Umatilla County,* 3 A. S. R., 142. In *Rawson v. School District,* 7 Allen, 125, *Chief Justice Bigelow,* in a discussion of the question, made use of the following language, which we may adopt as applicable in the present case: "We believe there is no authoritative sanction for the doctrine that a deed is to be construed as a grant on a condition subsequent solely for the reason that it contains a clause declaring the purpose for which it is intended the granted premises shall be used, where such purpose will not inure specially to the benefit of the grantor and his assigns, but is in its nature general and public, and where there are no other words indicating an intent that the grant is to be void if the declared purpose is not fulfilled. If it be asked whether the law will give any force to the words in a deed which declare that the grant is made for a specific purpose or to accomplish a particular object, the answer is, that they may, if properly expressed, create a confidence or trust, or amount to a covenant or agreement on the part of the grantee. Thus it is said in *Duke of Norfolk's case, Dyer,* 138 b, that the words *ea intentione* do not make a condition, but a confidence and trust: See, also, *Parish v. Whitney,* 3 Gray, 516, and *Newell v. Hill,* 2 Met., 180, and cases cited. But whether this be so or not, the absence of any

right or remedy in favor of the grantor under such a grant to enforce the appropriation of land to the specific purpose for which is was conveyed, will not, of itself, make that a condition which is not so framed as to warrant in law that interpretation. An estate cannot be made defeasible on a condition subsequent by construction founded on an argument *ab inconvenienti* only, or on considerations of supposed hardship or want of equity."

It is apparent, we think, that the grantors in the deed of 1897 did not intend to make a conveyance on condition subsequent. They and others, as corporators, procured the passage of an act incorporating the institute, and authorizing it to use and enjoy, alien, exchange, invest, convert, and reinvest all its property and assets in like manner with other institutions similarly chartered (*Page v. Covington,* 187 N. C., 621), and afterwards they brought about the execution of the mortgage for the benefit of the school and for the purpose they had in mind. In our opinion the deed conveyed to the trustees an estate in fee; and as there is no question of alleged rights arising out of a breach of covenant this subject need not be discussed.

The judgment is

Affirmed.

BOARD OF COMMISSIONERS OF CUMBERLAND COUNTY v. R. S. DICKSON & CO., AND STRANAHAN, HARRIS & OATIS.

(Filed 21 October, 1925.)

Appeal and Error—Rules of Court—Briefs—Judgments.

Where the appellant has not filed a brief in the Supreme Court, under the rule the judgment appealed from will be affirmed on appellee's motion, if upon examination of the record proper no error appears.

APPEAL by defendant from *Sinclair, J.,* September, 1925, at chambers, from CUMBERLAND.

Controversy without action, submitted on an agreed statement of facts, verified by J. T. Martin, chairman of the Board of Commissioners of Cumberland County, and John S. Harris, Vice-President of Stranahan, Harris & Oatis, Inc.

The proceeding is to determine the validity of certain school bonds and the binding effect of a joint bid made therefor by the defendants.

The case is brought to us for review from a judgment declaring the bonds to be valid and adjudging that "the defendant herein, the purchaser of said bonds, be, and it is hereby required to complete the purchase of said bonds in conformity with its contract."

Dye & Clark for plaintiff.
No counsel for defendant.

STACY, C. J. As the appellant has filed no brief in this Court, and no error is made to appear from an examination of the record proper, we must affirm the judgment on motion of appellee. *Mfg. Co. v. Simmons,* 97 N. C., 89; *Smith v. Mfg. Co.,* 151 N. C., 260; *Jones v. R. R.,* 153 N. C., 419; *Davis v. Wall,* 142 N. C., 450.

Affirmed.

CHESTER D. TURNER ET AL. v. SOUTHEASTERN GRAIN AND LIVESTOCK COMPANY ET AL.

(Filed 21 October, 1925.)

Judgments—Excusable Neglect—Motions—Appeal and Error.

Upon refusal of plaintiff's motion to set aside a judgment for surprise, mistake or excusable neglect, the findings by the judge below upon these questions adverse to plaintiff are not reviewable on his appeal.

APPEAL by several of the plaintiffs from *Barnhill, J.,* at February Term, 1925, of CRAVEN.

Motion of plaintiffs, Chester D. Turner, Devereaux Turner, George Lord and wife, Margaret Lord, to set aside judgment, rendered in this cause at the September Term, 1924, Craven Superior Court, on the grounds (1) that the appealing plaintiffs were not duly represented by counsel authorized to appear for them at the time of the entry of said judgment; and (2) that the same was taken through mistake, inadvertence, surprise or excusable neglect as to them. C. S., 600. Motion denied, and plaintiffs, as above named, appeal.

A. W. Graham & Son, C. D. Turner for plaintiffs.
Ward & Ward, D. L. Ward, T. D. Warren for defendants.

STACY, C. J. The judge found the facts, as he is required to do, and embodied them in the judgment. *Smith v. Holmes,* 148 N. C., 210. Upon the findings made, supported, as they are, by competent evidence, the motion was properly overruled. *Bartholomew v. Parrish, ante,* 151.

Not only did the judge find, upon ample evidence, that the appealing plaintiffs were duly represented by reputable and solvent counsel at

the time of the entry of the judgment in question and that the same was taken through no mistake, inadvertence, surprise or excusable neglect on their part or on the part of the appealing plaintiffs, but he went further and found that the plaintiffs had no meritorious cause of action in the matters alleged and upon which suit was based. *Crumpler v. Hines,* 174 N. C., 284. These findings are fatal to the appeal of the plaintiffs. *Bank v. Duke,* 187 N. C., 386; *Norton v. McLaurin,* 125 N. C., 185. And they are binding on us. *Gaster v. Thomas,* 188 N. C., 346.

There is no error appearing on the record.

Affirmed.

NEW HANOVER COUNTY v. JOHN H. WHITEMAN, ARNITA B. WHITEMAN, L. G. WHITEMAN, AND J. H. WHITEMAN, JR.

(Filed 21 October, 1925.)

1. Government—Taxes—Liens—Statutes—Limitation of Actions.

Where a county proceeds to foreclose a tax lien under the provisions of C. S., 7990, as distinguished from an action to foreclose the tax-sale certificate, instead of under those of C. S., 8037, which it may elect to do, it proceeds as a part of the state sovereignty, and there is no bar of the statute of limitations, that of C. S., 8037 not applying.

2. Same—Judgments.

Where a county brings suit to foreclose a tax lien on the lands of the taxpayer and draws its complaint according to the provisions of C. S., 7990, other taxes due after the commencement of the action are properly included in the judgment therein rendered in its favor.

APPEAL by defendants from NEW HANOVER Superior Court. *Dunn, J.*

The plaintiff sued the defendants, who are the heirs at law of Sarah Whiteman, deceased, to collect taxes assessed against the lands described in the complaint for the years 1916, 1917, 1918, 1919, 1921, 1922 and 1923, in the sum of, including interest as computed in the complaint, $292.68. The defendants denied the levy of the taxes alleged, and set up that the suit was, in effect, an action to foreclose tax certificates purchased by the plaintiff in 1917 and 1918 on account of sale for the taxes for the years 1916 and 1917, and pleaded the five years bar, as set out in C. S., 8037. A consent reference was had and the case was heard on exceptions to the report of the referee. From a judgment rendered in favor of the plaintiff the defendants appealed.

Nathan Cole for plaintiff.
John D. Bellamy & Sons for defendants.

VARSER, J. Under C. S., 8037 every holder of a certificate of sale of real estate for taxes is subrogated to the lien of the State (under the present taxation system there is now no tax levied on lands for state purposes), and of the county or other municipal corporation, for the taxes for which such real estate was sold, and each holder (other than counties and other municipal corporations) who elects to proceed under this statute is required to give to the owner or occupant of the real estate which he seeks to sell, ten days written notice of his intention to commence such action in foreclosure, and in his complaint each certificate of sale held by the plaintiff and each sum expended by him for taxes on such real estate shall be set out as a separate cause of action. It is further provided that inability to find the owner or occupant in the county in which the land is situated shall excuse the failure of plaintiff to give this ten-days notice.

An action under C. S., 8037 is in the nature of an action to foreclose a mortgage and must be commenced within two years from the date of the last certificate of sale held by the plaintiff when the plaintiff is not a county or other municipal corporation.

Counties and other municipal corporations may proceed under C. S., 8037, *if they shall so elect,* when the tax-sale certificates, or tax deeds, held by them, remain unredeemed as much as four years from the dates of such instruments, but such corporations will be barred by the lapse of five years from the delivery of the certificate of sale, or deed sought to be foreclosed. This statute expressly provides that it may be invoked by those who elect to proceed thereunder, and when election is made to sue under C. S., 8037, the limitations therein prescribed apply, and the benefits accrue. The holder of a tax-sale certificate or deed is entitled to recover interest at the rate of twenty per centum per annum "on all amounts paid out by him, or those under whom he claims, and evidenced by certificates of tax sale, deed under tax sale, and tax receipts," to be "computed from the date of each payment up to the time of redemption, or final judgment, and shall be added to the principal of the final judgment, which judgment shall bear interest as in other cases." The Legislature has provided a five years bar in actions under C. S., 8037.

When the action is to foreclose the tax lien, as distinguished from an action to foreclose the tax-sale certificate, or tax deed under C. S., 7990, *there is no statutory bar. Wilmington v. Cronly,* 122 N. C., 383; *Jones v. Arrington,* 94 N. C., 541; *R. R. v. Commissioners,* 82

N. C., 259. C. S., 7987 provides that the lien on realty for taxes levied, "shall continue until such taxes, with any penalty and costs which shall accrue thereon, shall be paid." *Carstarphen v. Plymouth,* 186 N. C., 90, 94; *Vaughan v. Lacy,* 188 N. C., 123.

Statutes of limitations never apply to the sovereign, unless expressly named therein. *Nullum tempus occurrit regi* is a principle of government which still retains its ancient vigor in respect to taxes. *Wilmington v. Cronly, supra.* Hence, the five years statutory bar in C. S., 8037 expressly limits itself to actions under that section, and, when considered in the light of its own limitation, as well as the doctrine that time does not run against the sovereign, we are unable to hold that the five years statutory bar applies to the instant case.

The power to tax is the highest and most essential power of the government, and is an attribute of sovereignty, and absolutely necessary to its existence. *R. R. v. Alsbrook,* 110 N. C., 137; *Faison v. Commissioners,* 171 N. C., 411; *Redmond v. Commissioners,* 106 N. C., 123; *Wilmington v. Cronly, supra; S. v. Petway,* 55 N. C., 396; *Pullen v. Commissioners,* 66 N. C., 361, 362; *McCulloch v. Maryland,* 4 Wheat., 316.

The defendants' contention that this is a hard case cannot be sustained. It is only requiring the defendants to pay their just and proportionate part of the expense of government. In its essential characteristics, a tax is not a debt, it is an impost levied by authority of government upon its citizens or subjects for the support of the state; it is not founded upon contract or agreement, it operates *in invitum. Gatling v. Commissioners,* 92 N. C., 536; *Guilford v. Georgia Co.,* 112 N. C., 34; *Wilmington v. Bryan,* 141 N. C., 666; *Commissioners v. Murphy,* 107 N. C., 38; *Graded School v. McDowell,* 157 N. C., 317; *Commissioners v. Hall,* 177 N. C., 490.

The plaintiff fashioned its complaint under C. S., 7990, and the court found as a fact that the action was instituted under that section, and the judgment follows the law, as therein set out. The defendants' exceptions present no contest as to the levy, but relate to the five years statutory bar in C. S., 8037; hence, they are without merit. The inclusion of taxes due after the action was instituted does not appear to be prejudicial to the defendant. This action is in the nature of a bill in equity to foreclose a lien and it is proper to include in the final judgment a disposition of all liens on the property. *Jones v. Williams,* 155 N. C., 179.

Therefore, let the judgment be

Affirmed.

BERTIE BAKER v. GEORGE R. WEST.

(Filed 21 October, 1925.)

Judgments—Motions—Findings—Appeal and Error.

Where judgment has been awarded in bastardy proceedings in conformity with C. S., 273, Laws of 1921, ch. 109, and upon defendant's motion in the Superior Court the judge has set the judgment aside upon sufficient evidence, the facts found accordingly are not reviewable on appeal to the Supreme Court.

APPEAL by plaintiff from an order of *Grady, J.*, 30 May, 1925, setting aside a verdict and judgment against the defendant. From CUMBERLAND.

A. M. Moore for plaintiff.
E. C. Robinson for defendant.

ADAMS, J. The plaintiff caused a warrant to be issued charging the defendant with bastardy. Upon the trial before a justice of the peace judgment was rendered for the plaintiff and the defendant appealed to the Superior Court. At the March Term, 1925, in the absence of the defendant the issue of paternity was answered in favor of the plaintiff; whereupon it was adjudged that the plaintiff recover of the defendant and his surety the penal sum of the bond to be discharged upon payment to the plaintiff of $200 at stated times as the judgment provides. C. S., 273; Laws 1921, ch. 109. An execution against property was issued on this judgment and returned unsatisfied; and afterwards an execution against the defendant's person under which he was arrested. Failing to secure his release by *habeas corpus* the defendant made a motion to set aside the judgment against him and at the May term the motion was allowed, the judgment was vacated, and the cause was continued.

The defendant's motion was made for alleged inadvertence, surprise, and excusable neglect under C. S., 600. The trial judge fully stated the facts in the judgment and found that the defendant had not been negligent and that he has a meritorious defense. There was evidence to support the judgment, and the findings of fact under these circumstances are not reviewable in this Court. *Lumber Co. v. Blue,* 170 N. C., 1; *Gaster v. Thomas,* 188 N. C., 346.

The judgment is
Affirmed.

LENOIR COUNTY, BOARD OF COMMISSIONERS OF LENOIR COUNTY, HEBER WORTHINGTON, SHERIFF, AND T. G. SUTTON, JAILOR OF LENOIR COUNTY, v. A. W. TAYLOR AND T. A. CONWAY, AND LENOIR COUNTY, BOARD OF COMMISSIONERS ET AL. v. A. W. TAYLOR.

(Filed 28 October, 1925.)

1. Public Officers—Sheriffs—Counties—Courts—Trial by Jury—Statutes.

In an action to compel the sheriff to turn over the property of a county to another alleged to have been properly appointed and inducted into office as his successor, the title to the office is not involved, and the cause is properly returnable before the judge in chambers, the matters controverted, both as to fact and law, not requiring the intervention of a jury under the provisions of C. S., 868.

2. Public Officers—Sheriffs—Accounting—County Commissioners—Bonds.

Where the sheriff has failed or refused to pay over the moneys he has collected as such to the proper county officials, C. S., 3926, it becomes the duty of the county commissioners, under the provisions of C. S., 3931, 3932, passed in pursuance of our Constitution, Art. VII, sec. 2, to require him to produce the receipts for his disbursements to the proper county officials, before accepting his bond as a prerequisite to his induction into office.

3. Same—Mandamus.

A mandamus at the suit of the county commissioners will lie to compel a sheriff wrongfully holding over from a preceding term, to turn over the county property pertaining to his office to his successor, lawfully appointed, qualified and inducted therein.

APPEAL by defendants from *Midyette, J.*, at chambers, 20 June, 1925. From LENOIR.

The relief sought in these actions by plaintiffs is the issuance of a writ of mandamus, requiring defendants forthwith to deliver to plaintiffs certain property of Lenoir County, required for the proper discharge of the duties of their respective offices, and withheld by defendants, under the claim that they are entitled to possession of same as sheriff and jailor, respectively, of said county.

The court found the facts, from the evidence submitted at the hearing, and thereupon ordered and adjudged that a "writ of mandamus issue to the defendant, A. W. Taylor, to deliver to Lenoir County and its board of commissioners, full and complete possession of the room in the courthouse of Lenoir County, heretofore known as the sheriff's office, together with the iron safe, filing devices, furniture and fixtures and all other property therein contained and heretofore used therewith; and further ordered, considered and adjudged that a writ of mandamus issue to the defendants, A. W. Taylor and T. A. Conway, to deliver to Lenoir County and its board of commissioners full and complete possession of the common jail, and building of which it is a part, and of the lot on which it is

situate, together with all property and fixtures contained therein and used therewith, belonging to Lenoir County."

From the judgment, defendants appealed, assigning errors discussed in opinion below.

Ward & Ward and Cowper, Whitaker & Allen for plaintiffs.
F. E. Wallace and Rouse & Rouse for defendants.

CONNOR, J. At the election held in November, 1924, defendant, A. W. Taylor, was duly elected sheriff of Lenoir County for the term of two years, beginning on the first Monday in December, thereafter. Said A. W. Taylor was first elected sheriff of Lenoir County at the election held in November, 1912; he has been elected to said office at each subsequent biennial election in said county, including the election of 1924. On the first Monday in December of each year, in which said biennial elections were held, he has duly qualified for and has been inducted into, said office by the board of commissioners of said county for the next succeeding term. He was, therefore, sheriff of Lenoir County for the term ending on first Monday in December, 1924.

On 1 December, 1924, at the meeting of the board of commissioners of Lenoir County, defendant, A. W. Taylor, appeared and presented his bond as sheriff-elect. Action on same was deferred by the board, for investigation, to an adjourned meeting to be held on 9 December, 1924.

On 9 December, 1924, A. W. Taylor, sheriff, with his counsel, appeared before the board and presented a proposed settlement of past-due taxes. The board appointed three of its members as a finance committee to examine the report of the sheriff and to report at an adjourned meeting to be held on 31 December, 1924.

On 31 December, 1924, the finance committee submitted its report to the board, showing the amount found by an audit to be due the county of Lenoir by A. W. Taylor, sheriff, for taxes for the years 1920, 1921, 1922 and 1923. Said A. W. Taylor, sheriff, being present with his counsel, having theretofore tendered his bonds required by law, demanded that same be accepted, and, that pursuant to his election in the preceding November, he be inducted into the office of sheriff for the term beginning 1 December, 1924. At same time, the said sheriff informed the board of his willingness, readiness and ability to settle with the county and all its officers, entitled to receive same, all amounts due by him for taxes. He insisted that the audit upon which the finance committee based its report to the board was incorrect in material respects; he denied that he was indebted to the county of Lenoir or to any of its officers, as shown by said audit. His request that he

be given an opportunity to further examine said audit and report was complied with and the meeting was adjourned to Saturday, 3 January, 1925.

On 3 January, 1925, report was made to the board of commissioners by the finance committee that A. W. Taylor, sheriff, was indebted on account of uncollected taxes for the years 1920, 1921, 1922 and 1923 in the sum of $47,961.25, including land sales advertised but not sold, and excluding land bid in by the county, and $8,953.36, insolvent list allowed by the finance committee. From this sum Sheriff Taylor claimed deductions, as itemized, amounting to $42,518.41, including land sales advertised and not sold—$23,000. He offered to pay over to the treasurer of the county, in cash, the sum of $5,442.84 for the purpose of indemnifying the county, if, upon an accounting, it should be determined that he owed the county any sum. Thereupon as sheriff-elect, he demanded that he be inducted into the office for the term beginning 1 December, 1924. The board approved the report of the finance committee and demanded settlement by the sheriff in accordance therewith. They declined to accept the bonds tendered by A. W. Taylor, as sheriff-elect, until he had made the settlement required, or to induct him into office. The meeting was adjourned to 5 January, 1925, and Sheriff Taylor was notified of the action of the board.

On 5 January, 1925, at the adjourned meeting, proceedings were had, as appears upon the minute docket of the board, as follows: "This board, at a former meeting held 3 January, 1925, having passed a motion or resolution extending the time in which the sheriff would be allowed to come forward and settle as required by the board until 3 o'clock p. m., 5 January, 1925, and it being now past the hour designated by the board for such settlement, Sheriff Taylor not having appeared, either in person or by counsel, and no further proposal or offer of settlement as demanded by this board having been presented, it was moved by Richard King, and duly seconded by J. R. Fields, that this board proceed to the election of a sheriff of Lenoir County. The above motion was carried, each member being present and voting in the affirmative."

"Upon motion of Richard King and seconded by R. R. Rouse, and duly carried, the election of Heber Worthington was made unanimous."

On 8 January, 1925, Heber Worthington, pursuant to his election by the board of commissioners, tendered the bonds required by law, and same were accepted and approved by the board. He was thereupon inducted into office as sheriff of Lenoir County for the term beginning 1 December, 1924.

After his qualification as sheriff, Heber Worthington appointed plaintiff, T. G. Sutton as jailor of Lenoir County; prior to said appointment

and subsequent to the first Monday in December, 1924, A. W. Taylor appointed defendant, T. A. Conway, as such jailor. Each derives his authority to hold said office from these appointments. The validity of their respective appointments will be determined by an adjudication as to whether Heber Worthington or A. W. Taylor is sheriff of Lenoir County for the term beginning on first Monday in December, 1924.

On the first Monday in December, 1924, A. W. Taylor, sheriff of Lenoir County for the term ending on that day, was in possession of and occupying the office in the courthouse which had theretofore been known as the sheriff's office, and which was and is equipped with iron safes, filing devices, and furniture and fixtures required for the proper discharge of the duties of the office of sheriff; he remained in possession of same, pending his settlement with the board of commissioners for taxes in his hands for collection, until 8 January, 1925; upon the election and qualification of Heber Worthington as sheriff, demand was made by plaintiffs upon said Taylor for possession of said office, etc.; notwithstanding such demand, said Taylor has failed and refused to vacate said office and to deliver said property to the board of commissioners or to Heber Worthington; defendant, T. A. Conway, is now in possession of the common jail of Lenoir County and all property used in connection therewith, claiming the right to hold same under his appointment by A. W. Taylor as jailor. Both defendants, A. W. Taylor and T. A. Conway, have failed and refused to surrender possession of said jail and property to plaintiffs, notwithstanding demand for same.

The court found as a fact "that the commissioners in all their actions, acted with good faith and within their rights, and the effect of their proceedings was, for the purpose of this action, to determine that A. W. Taylor, defendant, was not legally qualified to be inducted into the office of sheriff of Lenoir County for the ensuing term, beginning the first Monday in December, 1924."

The court found as facts that A. W. Taylor, sheriff-elect, "did not legally qualify before the commissioners and was not inducted into the sheriff's office for the said succeeding term by the commissioners, and that his legal holding as sheriff, as a holdover, was terminated by the action of the board at their meeting on Saturday before the first Monday in January, 1925;

That Heber Worthington was duly elected sheriff by the board on the first Monday in January, 1925, and duly qualified and was duly inducted into office on 8 January, 1925;

That it was admitted in the pleadings that demand was made by the plaintiffs and refused by the defendants prior to the beginning of these actions for the delivery to the plaintiffs of the possession of the property and effects involved in these actions."

Upon the facts found by the court, and in accordance with its conclusions of law, it was ordered, and adjudged that writs of mandamus issue as prayed for by the plaintiffs.

Defendants assign as error the refusal of the court to allow their motion to continue the action for the purpose of submitting certain issues tendered by them to a jury, in accordance with C. S., 868. If issues of fact are raised by the pleadings, in an application for a writ of mandamus, it is the duty of the court, under the statute, upon motion of either party, to continue the action until the issues can be determined by a jury at the next regular term of the court. There are no issues of fact, however, raised by the pleadings in these actions, determinative of the rights of plaintiffs to the relief sought. *Tyrrell v. Holloway,* 182 N. C., 64; *Durham v. R. R.,* 185 N. C., 240. This relief not being the enforcement of a money demand, the summons was properly made returnable before the judge of the Superior Court, at chambers; in determining plaintiff's right to the relief demanded, except for good cause shown, the court "shall hear and determine the action, both as to law and fact." This assignment of error is not sustained.

Defendants further assign as error the court's conclusions of law, that "in these actions there is no question of accounting between plaintiffs and defendant, A. W. Taylor, and his sureties," and that "the action of the commissioners in refusing to permit the defendant, A. W. Taylor, to be inducted into office, and in electing and inducting Heber Worthington into the office of sheriff, is controlling on the rights involved in this case, unless and until the defendant, A. W. Taylor, shall in some proper proceedings establish his right to the office of sheriff of Lenoir County for said term beginning on the first Monday in December, 1924."

A. W. Taylor, although elected by the qualified voters of Lenoir County, to the office of sheriff of said county, for a term of two years, beginning on the first Monday in December, after said election, was not eligible for said office, if he, having been theretofore sheriff of said county had failed to settle with and fully pay up to every officer the taxes which were due to him, C. S., 3926. Nor could the board of commissioners of said county, whose duty it is under the statute, to take and approve the official bonds required by law of a sheriff, permit A. W. Taylor, sheriff-elect, who was a former sheriff, to give the bonds or reënter upon the duties of the office, until he had produced before the board the receipt in full of every such officer for taxes which he had or should have collected, C. S., 3931.

The amount due by A. W. Taylor, sheriff, for taxes which he had collected or which it was his duty to collect, during his terms of office, prior to first Monday in December, 1924, was ascertained for the pur-

pose of a settlement by the sheriff, by the committee appointed by the board of commissioners under C. S., 8050; the report of this committee was approved and adopted by the board, acting in good faith, and in discharge of their duty under the law; by the express words of the statute, the account audited by the committee and approved by the board, is prima facie correct, and is impeachable only for fraud or special error. Until the sheriff-elect had produced receipts in full, showing the payment by him to the officers of the county who were entitled thereto, of the amounts due as shown by the settlement so audited and approved, the board of commissioners were forbidden, by statute, to permit the said sheriff-elect to file bonds required for his qualification for the term beginning on first Monday in December, 1925. If any board of commissioners shall fail to comply with the provisions of the statute, they shall be liable for all loss sustained in the collection of taxes, on motion to be made by the solicitor of the district, C. S., 3933.

Justice Manning, in *Hudson v. McArthur,* 152 N. C., 445, writing for the Court, says, that the evident purpose of the statute is to further protect and safeguard the public revenue and to further assure its honest collection and application by subjecting the commissioners to liability if they fail to require the proper bonds from the collecting officer, and we may add, if they permit the bonds to be filed in violation of the express language of the statute. No question of accounting can arise in this action. A sheriff-elect, who is a former sheriff of the county, cannot, lawfully, be permitted to give bonds for a new term, and to reënter upon the duties of the office for a new term, until he has settled with the officers of the county for amounts due by him in accordance with the audit made and approved as provided in C. S., 8050. *People v. Green,* 75 N. C., 329; *Colvard v. Comrs.,* 95 N. C., 515; *Somers v. Comrs.,* 123 N. C., 582.

If such settlement is fraudulent, or if in arriving at the amount claimed to be due by the sheriff, errors of law or fact are made to appear, it may be impeached by the sheriff, to the end that the true amount owed by him may be ascertained. The sheriff-elect, who is a former sheriff, in a quo warranto proceeding, to try the title to the office of sheriff for the term to which he has been elected, against the occupant of the office, holding under an election by the board of commissioners, may show that said settlement is erroneous, either in law or fact, or in both. Nor is the settlement conclusive upon the sheriff and the sureties on his official bonds, in an action to recover the amount shown by the settlement to be due by the sheriff. It is not open, however, for the sheriff-elect to attack the validity of the settlement or the correctness of the amount shown by same to be due, in an action or proceeding wherein the title to the office is not in issue.

The efficacy of these statutes to accomplish the purpose for which they were enacted would be destroyed if a controversy between the board of commissioners and the former sheriff, even in good faith, as to the amount due by the sheriff for taxes which he has or should have collected, should be held to deprive the board of commissioners of the power to perform the duty imposed upon them by the statute. The interests of the public require that pending an adjudication of the controversy between the commissioners and the sheriff, the duties of the office be performed.

It is the duty of the board not to permit a former sheriff, who has been elected to a new term, to give bonds for or to enter upon the performance of the duties of said office for said term, until he has produced the receipts required by statute. It is also its duty under the statute to audit, supervise and approve settlements between the sheriff and the treasurer and other officers, whose duties are to receive and disburse county funds; Const. of N. C., Art. VII, sec. 2. Power commensurate with these duties is conferred by statute. Upon the failure of the sheriff-elect to give bonds required by law, the board has power to elect some suitable person in the county as sheriff for the unexpired term, C. S., 3932. For the purpose of performing these duties, it must be held that the settlement audited by the finance committee and approved by the board, showing amount due by the sheriff, is conclusive.

The exercise of the powers conferred upon the board by statute, pursuant to the Constitution, which may result, if it shall be determined in a proper proceeding or action, that the amount demanded of the sheriff is not, because of errors in law or in fact, the true amount due by him, in depriving the sheriff-elect, at least temporarily of his office, and in thus thwarting the will of the qualified voters of the county, as expressed at the election, involves grave responsibilities. We may feel assured that no board of commissioners will undertake to exercise these powers without a keen appreciation of its responsibilities. We may likewise feel assured that no board will be deterred from performing its duty, in good faith, when such duty is manifest and clear. Assignments of error, based upon exceptions to the conclusions of law, are not sustained.

Defendants further assign as error the adjudication that plaintiffs are entitled to writs of mandamus, and the order that same be issued.

In *Person v. Doughton*, 186 N. C., 723, *Justice Stacy* says: "Mandamus lies only to compel a party to do that which it is his duty to do without it. It confers no new authority. The party seeking the writ must have a clear legal right to demand it, and the party to be

coerced must be under a legal obligation to perform the act sought to be enforced." See authorities cited.

Defendant, A. W. Taylor, having failed to qualify as sheriff for the term to which he had been elected, it became the duty of the board of commissioners forthwith to elect some suitable person in the county as sheriff for the unexpired term, C. S., 3929, 3932. The Court has found that Heber Worthington was duly elected by said board and has duly qualified as sheriff of Lenoir County. He, therefore, has a clear legal right to the property owned by the county, and required to be in his possession for the proper discharge of the duties of the office of sheriff. It was equally the clear duty of A. W. Taylor, who had the property in his possession, by virtue of his office as sheriff for a term which had expired, to surrender the same to his successor. The title of the county of Lenoir to the property is not in controversy; it is admitted. The rights of the public, with respect to said property, are paramount to any rights which the parties to the action may have to said property, or to the office of sheriff. The controversy between them, as to their rights as individuals to the office or to the property cannot be determined in this action. An adjudication as to these rights, if desired, must be had in an appropriate action or proceeding. Plaintiffs are entitled to the issuance of the writ of mandamus. *Tyrrell v. Holloway,* 182 N. C., 64, is decisive of the contention presented by this assignment of error; it cannot be sustained.

There is no error in the judgment and order of Judge Midyette. Many interesting questions are presented by the pleadings in these actions; they were discussed in the briefs and on the oral argument. We do not pass upon or discuss them as they are not essential to the determination of this appeal. It seems probable that they will arise in pending litigation growing out of the controversy between the parties. We have passed upon and determined only the assignments of error appearing on the record. They are not sustained and the judgment is

Affirmed.

D. W. WHITFORD v. O. W. LANE, RECEIVER OF THE POLLOCKSVILLE BANKING & TRUST COMPANY, NEW BERN BANKING & TRUST COMPANY, AND THE EASTERN BANK & TRUST COMPANY.

(Filed 28 October, 1925.)

1. Bills and Notes—Negotiable Instruments—Bailment—Special Contract.

The relation of bailor and bailee for hire is established where the owner of government bonds for a consideration loans them to a bank under an agreement for their return at a time specified, but where the

known purpose is to enable the bank to secure a loan by using these bonds as collateral to its note, it is upon a special contract that in the event of the failure of the bank to return the bonds, it would be liable in damages to the owner for the loss he may sustain by reason of the failure of the maker of the note to pay it.

2. Same—Equity—Marshaling Assets—Exoneration.

The owner of government bonds loaned them upon consideration to a bank for the purpose of its hypothecating them as collateral to a note given for money borrowed by it from another bank, its note containing the stipulation that collateral securities to the note may be considered as collateral to other notes of the maker, etc., with knowledge of the lending bank of the purpose for which the bonds were loaned; and without the knowledge or consent of the owner that it was used for other purposes this note was later included in a larger note with other collateral of the borrowing bank, and upon default in payment: *Held*, the lending bank was required to marshal the assets from the further collateral of the borrowing bank, to the exoneration *pro tanto* of the bonds specially loaned.

APPEAL by both plaintiff and defendants from *Barnhill, J.*, at March Term, 1925, of JONES.

Action by plaintiff to recover of defendant ten Liberty Loan Bonds of the par value of $10,000, or in lieu thereof, the value of said bonds.

On 5 February, 1921, plaintiff, owner of said bonds, delivered the same to the Pollocksville Banking & Trust Company, under an agreement in writing by which the said Pollocksville Banking & Trust Company agreed to return the said bonds to plaintiff on or before 1 January, 1922. Subsequently Pollocksville Banking & Trust Company transferred said bonds to the New Bern Banking & Trust Company as collateral security for the payment of its note to the said New Bern Banking & Trust Company for $26,000 for money loaned to it. Upon default in the payment of the said note, New Bern Banking & Trust Company sold the said bonds and other bonds held by it as collateral for said note, and out of the proceeds of the said sale, paid said note and accrued interest. Said company thereupon applied the excess of the proceeds of the said sale, to wit, the sum of $4,644.83, as a payment on other indebtedness then due it by Pollocksville Banking & Trust Company.

After 1 January, 1922, plaintiff demanded of defendant, O. W. Lane, who had been appointed receiver of Pollocksville Banking & Trust Company and of New Bern Banking & Trust Company, the return of said bonds in accordance with the agreement under which they were delivered by plaintiff to Pollocksville Banking & Trust Company. He alleges that New Bern Banking & Trust Company, which had changed its name and was doing business under the name of the Eastern Bank & Trust Company, wrongfully converted said bonds to its own use;

he demanded judgment that in event same could not be returned that he recover of the said Eastern Bank & Trust Company the value of said bonds, so wrongfully converted by it.

From the judgment rendered, both plaintiff and defendants appealed to the Supreme Court.

Moore & Dunn for plaintiff.
J. K. Warren for O. W. Lane, receiver.
Ward & Ward for Eastern Bank & Trust Company.

CONNOR, J. On 5 February, 1921, plaintiff, D. W. Whitford, owned and had in his possession ten Liberty Loan Bonds of the United States of America of the par value of $10,000. On said date he delivered said bonds to the Pollocksville Banking & Trust Company, a corporation engaged in the business of banking, in this State, pursuant to an agreement with respect to said bonds, in writing, signed by both parties. In said agreement, Pollocksville Banking & Trust Company agreed to return said bonds to plaintiff on or before 1 January, 1922. Said company procured the loan of said bonds by plaintiff to it for the purpose of using same as collateral for money which it then contemplated borrowing. This purpose, the jury has found, was known to plaintiff at the time he delivered said bonds to Pollocksville Banking & Trust Company.

On said date Pollocksville Bank & Trust Company deposited said bonds with the New Bern Banking & Trust Company, a corporation engaged in the business of banking, in this State, as collateral security for a loan of $8,000, contemporaneously made to it by said New Bern Banking & Trust Company. On 25 May, 1921, the note for this loan, which was then past due, was consolidated with other notes then held by New Bern Banking & Trust Company into one note, for $26,000; as security for this consolidated note, which was due on 24 July, 1921, Pollocksville Banking & Trust Company deposited Liberty Loan Bonds, of the par value of $23,000 which it owned, but which had been theretofore deposited by it with New Bern Banking & Trust Company as collateral security together with the bonds which had been delivered to it by plaintiff, under the agreement aforesaid, of the par value of $10,000, making the total security for said note of $26,000, Liberty Loan Bonds of the par value of $33,200.

The note for $26,000 was not paid at maturity. On 22 October, 1921, under the power of sale contained in the note, New Bern Banking & Trust Company sold all said bonds, receiving therefor the sum of $31,039.16. From said sum New Bern Banking & Trust Company paid the note for $26,000 and accrued interest—$394.33—leaving in its hands an excess of $4,644.83.

At the date of the loan of $8,000, to wit, 5 February, 1921, and also at the date of the note for $26,000, to wit, 25 May, 1921, the Pollocksville Banking & Trust Company was indebted to New Bern Banking & Trust Company in a large sum, as evidenced by notes, not including the notes specifically secured by Liberty Loan Bonds; this indebtedness was secured by the assignment and deposit of various notes and other securities, the face value of which largely exceeded the amount of the indebtedness. This indebtedness was past due on 22 October, 1921, and New Bern Banking & Trust Company applied the sum of $4,644.83, the excess in its hands from the sale of the Liberty Loan Bonds, including the bonds which plaintiff had delivered to Pollocksville Banking & Trust Company under the agreement aforesaid, as a payment on this indebtedness. New Bern Banking & Trust Company has collected large sums of money on the notes and securities, which were assigned and deposited with it by Pollocksville Banking & Trust Company as collateral for its indebtedness. It now has in hand many of said notes and securities; a balance remains due on the indebtedness of the Pollocksville Banking & Trust Company to New Bern Banking & Trust Company, now doing business under the name of Eastern Bank & Trust Company; as security for said balance, Eastern Bank & Trust Company holds collateral now in its hands and uncollected, deposited by Pollocksville Banking & Trust Company with it, the face value of said collateral being largely in excess of the balance due on its indebtedness.

The jury has found as a fact that at the time plaintiff loaned the bonds to the Pollocksville Banking & Trust Company he knew of the purpose of said company to use the same as collateral security for loans which it then contemplated procuring to be made to it, and that with this knowledge he delivered said bonds to the Pollocksville Banking & Trust Company.

The jury has further found as a fact that when the New Bern Banking & Trust Company accepted said bonds as collateral security for the loan made by it to Pollocksville Banking & Trust Company, it knew that the bonds had been delivered by plaintiff to Pollocksville Banking & Trust Company under the agreement in writing for the purpose aforesaid and that it was therefore not a purchaser of said bonds, for value, before maturity, without notice of any defect or infirmity in the title to said bonds of the Pollocksville Banking & Trust Company.

These facts are determinative of the rights and obligations of the parties to this action, with respect to said bonds or to the proceeds of the sale of the same.

Upon the facts found by the jury and upon admissions made in the pleadings and on the trial of the action, the court was of the opinion

and so held that New Bern Banking & Trust Company had the right to sell the bonds held by it and delivered by plaintiff to Pollocksville Banking & Trust Company, upon default in the payment of the note specifically secured by said bonds, and to apply the proceeds of said sale to the payment of said note, after having first exhausted the proceeds of the sale of the Liberty Loan Bonds owned by Pollocksville Banking & Trust Company and also held by New Bern Banking & Trust Company as security for said note.

The court was further of opinion, and so held, that the application of the excess remaining in its hands from the sale of said bonds, to wit, $4,644.83, as a payment on indebtedness of Pollocksville Banking & Trust Company, not specifically secured by said bonds, was without authority and that plaintiff is entitled to recover of New Bern Banking & Trust Company (now Eastern Bank & Trust Company), the said sum of $4,644.83, wrongfully applied as such payment.

The court was of the opinion, and so held, that plaintiff was entitled to an accounting with New Bern Banking & Trust Company (now Eastern Bank & Trust Company), to the end that proceeds from collection of notes and securities in its hands, as collateral for indebtedness due to it by Pollocksville Banking & Trust Company, after the payment of said indebtedness, might be applied in exoneration of the bonds loaned by plaintiff to Pollocksville Banking & Trust Company, under the agreement of which New Bern Banking & Trust Company had notice at time said bonds were deposited with it.

Judgment was therefore rendered that plaintiff recover of defendant, Eastern Bank & Trust Company, the sum of $4,644.83, with interest at 6 per cent from 22 October, 1921, and the costs of the action to be taxed by the clerk.

It was further ordered that the action be retained to the end that the equities between the parties may be adjusted by the court when the accounting ordered has been made.

Plaintiff assigns as error the submission by the court to the jury of the second issue, which was as follows:

"2. Did the plaintiff have knowledge at the time he loaned the bonds, set out in the agreement and described in the complaint, that the Pollocksville Banking & Trust Company was borrowing same for the purpose of depositing them as collateral security?"

The relationship between plaintiff and the Pollocksville Banking & Trust Company, with respect to said bonds, under their agreement was that of bailor and bailee for mutual benefit; the company agreed to pay to plaintiff, for the use of the bonds, the sum of $50 per month; the consideration for this agreement was the right to use said bonds from 5 February, 1921, to 1 January, 1922; the company agreed to

return the bonds to plaintiff on the latter date; however, it is apparent from the terms of the agreement, that both parties contemplated, as a probable contingency, the company's inability to return said bonds; the company transferred and assigned to the plaintiff two notes, aggregating $10,000, directing, if it failed in any respect to comply with its agreement, that plaintiff should collect said notes and retain the proceeds thereof; it is expressly provided that his right to do this is "in addition to his right to sue for the return of the bonds."

As between plaintiff and the Pollocksville Banking & Trust Company, plaintiff was entitled on 1 January, 1922, to the return of the bonds, or to the payment of their value as damages for the breach of the company's contract to return them. New Bern Banking & Trust Company (now Eastern Bank & Trust Company), however, is not a party to this bailment. It is the assignee and transferee of the bailee. In paragraph 2 of its amended answer it says that "at the time of the loaning of the bonds in controversy by plaintiff to Pollocksville Banking & Trust Company, it was understood as a part of the transaction that the loan of the bonds was being made so that Pollocksville Banking & Trust Company could hypothecate them and borrow money on them."

This is an allegation of a special contract between the bailor and the bailee, affecting the rights of a creditor of the bailee who loaned money and took the bonds as collateral security for the loan. Without the special contract as alleged, the bailee had no authority to sell or pledge the bonds, and a creditor, although an innocent purchaser for value, acquired no title to the bonds as against the bailor. 3 R. C. L., 142. If, however, the bailor, with knowledge that the bailee was borrowing the bonds for the purpose of transferring and assigning them to a creditor as collateral security, delivered them to the bailee, who thereafter assigned and transferred them as collateral security for a loan, he was estopped from asserting title to said bonds against such bona fide creditor. 3 R. C. L., 143.

The issue submitted arises upon the pleadings. There was no error in submitting the second issue, and the exception cannot be sustained.

Plaintiff's assignments of error, presenting his contention that New Bern Banking & Trust Company held the bonds subject to the right of plaintiff, as against Pollocksville Banking & Trust Company, to the return of the bonds on 1 January, 1922, cannot be sustained. This contention is inconsistent with the understanding between plaintiff and Pollocksville Banking & Trust Company that the latter contemplated using the bonds as collateral security. The bonds were in the rightful possession of New Bern Banking & Trust Company and said company had authority to sell the same and apply the proceeds of the sale to

the payment of the loan, which this company made upon the security of said bonds. As against New Bern Banking & Trust Company, plaintiff is not entitled to the return of said bonds nor to so much of the proceeds of their sale as was required to pay its loan. *Clark v. Whitehurst,* 171 N. C., 1, cited by plaintiff, has no application to this case. See *Newsome v. Bank,* 169 N. C., 534, where it is held by this Court that the owner of notes, deposited as collateral for the debt of another, is entitled to the return of the notes upon the payment of the debt, or to the excess from the proceeds of the collection of the notes, if the debt has been paid therefrom.

In the note executed by Pollocksville Banking & Trust Company payable to the order of New Bern Banking & Trust Company, dated 25 May, 1921, it is provided that "said collateral may from time to time, by mutual consent, be exchanged for others, which shall also be held by said company on the terms above set forth; and that if we shall come under any other liability or enter into any other engagement with said company, while it is the holder of this obligation, then the proceeds of the sale of the above securities may be applied either on this note or on any other liabilities or engagements held by said company, as its president or cashier may elect."

There is no evidence that Pollocksville Banking & Trust Company came under any other liability to or entered into any other engagement with New Bern Banking & Trust Company, after 25 May, 1921; it therefore held the bonds as security for this note only; it was without authority to apply said bonds or any part of the proceeds of the sale of the same except as a payment on the note for which they were specifically pledged. Colebrook on Collateral Securities, sec. 97.

New Bern Banking & Trust Company held as specific security for the note executed by Pollocksville Banking & Trust Company (1) bonds owned by its debtor, (2) bonds owned by plaintiff. Clearly, the bonds owned by the debtor must first be applied to the payment of the debt, in exoneration of the bonds owned by plaintiff. 6 Pomeroy Eq. Jur., sec. 912-2.

If in addition to the specific security for this note, the New Bern Banking & Trust Company held securities, the property of Pollocksville Banking & Trust Company, as specific security for other indebtedness of Pollocksville Banking & Trust Company and also as general security for all its indebtedness to New Bern Banking & Trust Company, after the payment of the indebtedness for which these securities were specifically pledged, the remainder of the securities should be applied in exoneration of bonds of plaintiff, upon well-settled principles of equity for the protection of a surety. The bonds of the plaintiff are secondarily liable for the payment of the note; securities owned by the

debtor and transferred to a creditor as general collateral and held as such, are and should be primarily liable for the payment of all indebtedness of the debtor to the creditor in exoneration of collateral owned by a third person and specifically pledged by the debtor with the consent of the owner. Plaintiff as owner of the bonds, secondarily liable, is entitled to be subrogated to the rights of the creditor in and to securities of the debtor which are primarily liable for the indebtedness. In order to ascertain the facts with respect to these matters, an accounting was properly ordered by his Honor.

If upon such accounting it shall appear that Eastern Bank & Trust Company now has in hand any collateral, or proceeds of any collateral, sold or collected by it, owned by Pollocksville Banking & Trust Company, and transferred as security for its indebtedness to New Bern Banking & Trust Company, plaintiff will be entitled to the application of same, under orders of the court, to the full exoneration of his bonds. Both plaintiff and Eastern Bank & Trust Company are creditors of Pollocksville Banking & Trust Company, and plaintiff is entitled to the equitable remedy of marshaling with respect to securities held by Eastern Bank & Trust Company. Eaton on Equity, p. 513; *Harris v. Cheshire,* 189 N. C., 219.

We have carefully examined defendant's assignments of error. They cannot be sustained. The judgment is supported by well-settled principles, and is in accord with the authorities. There is

No error.

W. E. SHARPE AND C. V. SHARPE v. NORTH CAROLINA RAILROAD COMPANY.

(Filed 28 October, 1925.)

Injunction—Equity—Deeds and Conveyances—Reverter—Estates.

Where a deed to lands is given upon condition that it shall be forfeited and revert to the original owner if or when used for certain immoral or unlawful purposes, in a land development with other like grantees, a deed from the original owner removing these conditions releases the mere right of a bare possibility of reverter not assignable at common law, and is not subject to be enjoined in equity by those who have purchased the lands under deeds having similar provisions.

APPEAL by plaintiffs from ALAMANCE Superior Court. *Grady, J.*

Action by plaintiffs against defendant for damages on account of release of defendant's rights in reversion clause and for injunction

against further releases. From a judgment in favor of defendant sustaining its demurrer, plaintiffs appealed. Affirmed.

Plaintiffs allege that they own a lot of land in the city of Burlington, which is a part of a larger parcel of land conveyed by defendant to one Fonville; that defendant's deed to Fonville contains the following:

"That if the said Lindsey J. Fonville, his heirs or assigns, shall hereafter establish, keep up or maintain, or suffer to be established, kept or maintained, or shall rent or lease said lot to any person who shall establish, keep up or maintain any house of ill-fame or house for the sale of spirituous or fermented liquors or for any species of gaming on said lot or any part thereof, then and in that case their right, title and property in and to the lot aforesaid shall be forfeited and revert to the North Carolina Railroad Company."

Plaintiffs further allege that one Qualls owns a lot adjoining plaintiffs' lot, which is also a part of the Fonville purchase from the defendant; that defendant's tract was known as lot No. 132 in the map and plan of the city of Burlington; that both the plaintiff and Qualls hold their respective lots under Fonville, who purchased lot No. 132 from the defendant.

That defendant, at one time, owned the land on which the business section, and a good portion of the residential section of the present city of Burlington is now located; that in selling such property defendant followed a general plan under which it placed the restrictions, as appear in the Fonville deed, on the use of such property as protection to the purchasers, their heirs and assigns, and for its own benefit, and that stipulations, as set out in the Fonville deed, were inserted in all of the defendant's deeds for Burlington land executed prior to the year 1903, and that it was generally understood by the people of Burlington, including the plaintiffs, that such clause was inserted as a restriction on the use of the property as a part of the general plan of development.

That plaintiffs purchased a lot from Fonville with knowledge of this restriction.

That defendant has recently executed and delivered to Qualls a deed whereby it "hath waived, released and quit-claimed and by these presents doth waive, release and quit-claim unto the said party of the second part (Qualls), or his heirs and assigns, any and all interest of the said party of the first part which arises or may arise by virtue of the reversion clause," set out in the Fonville deed; and in the habendum the land is to be held "free from any claim of reversion which now exists or might arise by reason of the reversion clause" in the Fonville deed. That the defendant was about to execute other deeds making like re-

leases, and that plaintiffs had suffered damages on account of the Qualls release, and would suffer irreparable damages if others were permitted.

The defendant demurred for that the complaint does not state facts sufficient to constitute a cause of action, for that the release complained of was within the defendant's legal rights, and that the defendant is under no obligation, expressed or implied, to the plaintiffs against the releasing of its interest in the reversion clause described in the complaint, and that, therefore, it is liable to the plaintiffs for no damages, and that plaintiffs have no equity to restrain the defendant from executing further releases from this reversion clause.

Upon a hearing of this demurrer, judgment was rendered in favor of the defendant sustaining the demurrer, and dismissing the action with costs. Plaintiffs excepted and appealed.

Dameron, Rhodes & Thomas for plaintiffs.
J. Bayard Clark, Coulter, Cooper & Carr for defendant.

VARSER, J. The North Carolina Railroad Company, by virtue of the last clause of the quoted stipulation in the Fonville deed, had a mere possibility of reverter. The reverter will not take place unless there is a violation of the restrictions named as to the use of the granted premises. The provision plainly shows that the reverter can only operate to revest the title in the North Carolina Railroad Company and not in the plaintiffs or others similarly interested under deeds with the same provisions.

This bare possibility of a reverter under a condition subsequent is not assignable at common law. The same rule now prevails in this State. *Helms v. Helms,* 137 N. C., 206; *Ruch v. Rock Island,* 97 U. S., 693; *Nicoll v. R. R.,* 12 N. Y., 121; Mordecai's Law Lectures, 559. A mere possibility of reverter was not included in 32 Henry VIII, but this statute applied to a reversion which was an estate in land. This bare possibility may not be devised or conveyed, but may be released. *Church v. Young,* 130 N. C., 8; *Hollowell v. Manly,* 179 N. C., 262, 265; *Helms v. Helms, supra; Blue v. Wilmington,* 186 N. C., 321, 324. Such provisions providing for a forfeiture upon breach of condition subsequent create a determinable fee. Many courts, since the passage of the statute of *Quia Emptores,* question the possibility of such an estate, for that the whole fee is granted and there is no estate in reversion left in the grantor, and, therefore, nothing to support the right of reverter. Tiffany on Real Property, 336; Gray on Perpetuities, 774, 778; *Collier v. Walters,* 17 L. R. Eq., 252. However, the majority of the earlier writers on real property and many states in

this country, including North Carolina, have frequently recognized its existence. Tiffany on Real Property, 337; *Burlington & C. R. Co. v. Colorado R. Co.*, 38 Col., 95; *Loomis v. Heublien*, 91 Conn., 146; *Gibson v. Hardaway*, 68 Ga., 370; *Friedman v. Steiner*, 107 Ill., 125; *Aldred v. Sylvester*, 184 Ind., 542; *Ry. Co. v. Des Moines* (Iowa), 159 N. W., 450; *Pond v. Douglas*, 106 Me., 85; *Reed v. Stouffer*, 56 Md., 236; *First Universalist Soc. v. Boland*, 155 Mass., 171; *Board of Cumberland Co. v. Buck*, 79 N. J. Eq., 472; *Leonard v. Burr*, 18 N. Y., 96; *Slegel v. Lauer*, 148 Pa. St., 236; *Halifax Congregational Soc. v. Stark*, 34 Vt., 243; Gray on Perpetuities, paragraphs 31-40; *Hall v. Turner*, 110 N. C., 292; 3 Blackstone, 192. Hence, this possibility of reverter to the defendant upon breach of the condition subsequent exists only for defendant's benefit, and it has the full right and power to release or to estop itself from asserting the reverter. An instrument of writing under seal is an appropriate method to effect a release or to create such an estoppel, which is commonly called a waiver. *Huntley v. McBrayer*, 172 N. C., 642; *Harwood v. Shoe*, 141 N. C., 161; *Ruch v. Rock Island, supra; Sharon Iron Co. v. City of Erie*, 41 Pa. St., 341; *Ludlow v. Ry.*, 12 Barbour, 440; *Hubbard v. Hubbard*, 97 Mass., 188; *Chalker v. Chalker*, 1 Conn., 79; *Judd v. Robinson*, 41 Colo., 222; Tiffany on Real Prop., (2 ed.), 295; *Richburg v. Bartley*, 44 N. C., 418; *Brittain v. Taylor*, 168 N. C., 271; *Stamper v. Stamper*, 121 N. C., 251.

If, however, the clause in the Fonville deed, which is affected by the deed of release to Qualls, is a restrictive covenant coupled with a condition subsequent, and if the plaintiffs, or other landowners, have acquired an interest in the performance of the restrictive covenants in the Fonville deed, then the release, on the part of the defendant, does not disturb the plaintiffs and does not impair their right to injunctive relief against adjoining landowners to prevent or restrain a breach of these covenants. *Bohm v. Silberstein* (Mich.), 189 N. W., 899; *Muller v. Weiss*, 108 Atl., 768, affirmed in the Court of Appeals, 109 Atl., 357; *Goulding v. Phinney*, 125 N. E., 703; *Baker v. Lunde*, 114 Atl., 673.

We are of opinion, and so hold, that the release by defendant to Qualls does not affect the provision in the Fonville deed, further than a release of the possibility of reverter may affect it, and since the plaintiffs have no legal interest in this reverter, they cannot maintain this action; and the court below was right in sustaining the demurrer. Whatever may be the plaintiff's rights in equity to restrain the commission of the acts mentioned in the Fonville deed is not now before us, and, therefore, not decided.

The judgment appealed from is

Affirmed.

HIRAM BAGGETT v. C. J. SMITH AND C. H. SEXTON, TRUSTEES OF THE ESTATE OF SARAH M. ANDREWS, AND E. F. YOUNG, TRUSTEE.

(Filed 28 October, 1925.)

1. Estates—Wills—Trusts—Contingent Interests—Vested Rights—Executors and Administrators.

A devise of an estate in trust for the testator's son and wife for life and to the testator's grandchildren of the marriage until the youngest child becomes 21 years of age, with certain contingent limitations over to their children, but in the event of the death of such grandchild or grandchildren in the lifetime of their parents, the others surviving should take their interest: *Held*, the testator's grandchildren acquired a vested interest in the estate at the time of the testator's death, the future enjoyment of the possession of which was fixed at the coming of age of the youngest child; and the trustee could convey a fee-simple title.

2. Judgments—Estoppel—Process—Partition—Defects Cured.

A defect of service of summons on a mental incompetent in proceedings to sell lands to make assets, may be cured by thereafter aptly and in due time moving in the cause and curing the defects, and the question of mental capacity thus concluded by the judgment of the court will become final by failure to appeal therefrom.

3. Deeds and Conveyances—Warranty—Breach—Damages.

In order to maintain an action on a breach of warranty in a deed, the complainant must show his eviction or some injury in respect to the title conveyed to him, before action commenced.

4. Same.

Under an executor's deed to lands without a warranty, the grantee cannot recover as damages against him an amount he claims to have lost by reason of defective title and his consequent failure to sell to another at a profit.

APPEAL by plaintiff from *Lyon, J.*, at March Special Term, 1925, of HARNETT. Affirmed.

By virtue of a judgment of the Superior Court of Harnett County rendered at the September Term, 1920, in an action entitled "George E. Prince, surviving executor of Sarah E. Andrews, deceased, v. James C. Andrews, Rory Andrews, and J. C. Andrews, Jr.," said George E. Prince as surviving executor executed and delivered to the plaintiff a deed in fee for a tract of land containing 823 acres at the price of $20,000. The plaintiff paid $3,000 in cash and executed bonds for the remaining $17,000 and secured their payment by a deed of trust on the land, in which E. F. Young was named as trustee. The plaintiff alleges that the deed from Prince, executor, and the proceeding authorizing its execution represented the title to be good, but it was defective in that Rory Andrews, an heir at law of Sarah Andrews, had not been served

with process and had not consented to the sale; and further, that said Rory was not of sufficient mental capacity to attend to his ordinary business affairs and had not been represented by a guardian; and that the plaintiff filed a petition and motion in the proceeding above referred to for the purpose of curing the alleged defects. Plaintiff asks that the deed executed to him by Prince, executor, be canceled, that the bonds and the cash payment of $3,000 be returned to him, and that there be an accounting in which he shall be credited with improvements and charged with rents and profits.

The defendants (Smith and Sexton having been appointed trustees after the death of George E. Prince) filed an answer admitting certain allegations, denying others, and praying judgment for the amount due on the bonds and for a foreclosure of the deed of trust. Upon the hearing the plaintiff's cause of action was dismissed and judgment was given in favor of the defendants for $17,000, with interest, and for a sale of the land for foreclosure. The plaintiff excepted to the judgment and appealed.

Charles Ross and Biggs & Broughton for plaintiff.
Clifford & Townsend for defendants.

ADAMS, J. The plaintiff contends that the deed executed to him by George E. Prince as surviving executor on 18 September, 1920, did not convey a perfect title by reason of irregularities in the special proceeding by which the deed was authorized. In the will of Sarah M. Andrews are the following items:

(1) It is my will and desire and direction that my executors shall hold and retain possession of all of my property of every kind and description during the lifetime of my son Joseph and his wife, Janie C. Andrews, and until their youngest child shall become twenty-one years of age. During said period my said executors are to have power to make such changes in my personal estate as in their judgment may be necessary and proper. They may collect my securities when they mature and reinvest the amount so collected as they may deem proper and necessary for the best interest of my estate, and they are to use such sum from the income of my estate as may be necessary to protect and care for the same and meet all lawful charges against the same.

(2) It is my will, desire and direction that my executors shall pay over to my son Joseph so much of the net income from my estate as may be necessary to support himself and family, and in case of his death before his wife, then she and her children, that is to say, the children of my son Joseph, are to receive out of the net income from

my estate such amount from time to time as may be necessary for their maintenance and support. After the death of my son and his wife, then their children are to be provided with a support out of said income until the youngest shall become of age.

(3) It is my will, however, and direction that after the death of my son and his wife, each child shall receive the sum of one thousand dollars, when such child shall become of age, and my executors are directed to provide for the education of my son's children before they come of age. While it is my intention that my executors shall decide how much of the income from my estate shall be necessary to be expended from time to time for the support of my son and his family, I yet desire and direct that they provide for the comfort, support and reasonable pleasure of him and his family. After my executors shall have paid out of the income from my estate all the sums directed by me to be paid in this will, they are to add any balance remaining in their hands to the principal at the end of each year, and said executors to make annual returns and reports to the proper officials so long as my estate shall remain in their hands.

(4) After the death of my son Joseph and his wife, and when thereafter his youngest child shall become of age, then I give, bequeath and devise all of my estate then remaining, both real and personal, unto the children of said Joseph C. Andrews, or the lawful heirs of any deceased child, to have and to hold to them and their heirs absolutely in fee simple forever, to be divided amongst said children and the heirs of any deceased child as provided by the laws of the State.

Joseph C. Andrews died 7 March, 1920, leaving surviving him his widow and two children, Rory and Joseph C. Andrews, Jr. Judge Devin's judgment authorizing a sale of the land to the plaintiff was rendered 6 September, 1920; and in the proceeding Joseph C. Andrews, Jr., the only minor, was represented by a guardian *ad litem,* and according to a recital in the judgment Rory Andrews had been duly served with process by publication.

It is said that until the death of Janie C. Andrews, the life tenant, and until the younger of the two children shall have reached the age of twenty-one, it cannot be known who will take under the will, whether Rory and Joseph, or the heirs of one of them or of both. Evidently, however, the testatrix did not intend to create such a contingency. She directed the executors to retain possession of all her property during the life of her son and his wife and during the minority of their youngest child, and devised the land in controversy to the children of her son after his death and the death of his wife, deferring the children's actual possession, however, until the youngest child should

arrive at the age of twenty-one years. If either of the children had died during the lifetime of the father and mother his interest would have gone to his lawful heirs by express direction. In *Ziegler v. Love*, 185 N. C., 40, we had occasion to say: "Estates considered with regard to their certainty and to the time when they may be enjoyed are distinguished as vested and contingent. When there is an immediate fixed right of present or future enjoyment an estate is vested—vested in possession when there exists a right of present enjoyment, and vested in interest when there is a present right of future enjoyment." In effect the executors were made trustees to preserve the estate in which the children acquired a vested interest in the sense of a present right of future enjoyment—the clause, "When thereafter his youngest child shall become of age," merely indicating the time fixed for the future enjoyment of the vested interest.

The plaintiff also contends that Rory Andrews was not properly made a party to the special proceeding and that his interest in the land was not thereby affected; and, moreover, that he was mentally incompetent when the proceeding was instituted. In reference to this objection the record discloses these facts: Some time after Judge Devin had ordered that the land be sold to the plaintiff (6 September, 1920), the plaintiff filed a petition in the Superior Court to have certain alleged defects in his title cured or the conveyance set aside. Judge Allen made an order (November Term, 1922) that the trustees, C. J. Smith and C. H. Sexton, and Janie C. Bell (Andrews), Rory Andrews and J. C. Andrews, Jr., appear on 20 November, 1922, and answer the plaintiff's petition, declaring their interest if any in the land. J. L. Hatcher was appointed guardian *ad litem* of J. C. Andrews, Jr., and an answer and a reply were duly filed. The reply called in question the mental capacity of Rory Andrews and at the November Term, 1923, a guardian *ad litem* was appointed to represent his interest. One year afterward (November Term, 1924) the cause again came on for hearing before Judge Devin and he found as a fact that the sale of the land made by George E. Prince, executor, under a decree of the court was for the benefit of all the parties, including Rory Andrews, and thereupon adjudged that the sale made to the plaintiff by George E. Prince, executor, be again ratified, approved, and confirmed. From this judgment there was no appeal. The plaintiff, then, has the final judgment of a court of competent jurisdiction rendered in an action in which all who had an interest adverse to his were made parties; also a deed from Rory Andrews for his interest in the land, dated 13 November, 1922, expressly affirming and assenting to the deed executed by George E. Prince, executor.

It is finally contended by the plaintiff that the maker of his deed knew he was buying the land for the purpose of developing and selling it; that after making improvements thereon he was offered $22,500 for it and that he was unable to make the sale by reason of a claim asserted by Rory Andrews. It appears, however, that there is no warranty of title in the plaintiff's deed; that the grantor was acting in the capacity of surviving executor, and executed the deed under a judgment of the Superior Court. Besides all this, even if there had been a warranty there is no evidence that the plaintiff has been evicted, or that his possession has been disturbed. *Lockhart v. Parker,* 189 N. C., 138, 143; *Cover v. McAden,* 183 N. C., 641, 644; *Cedar Works v. Lumber Co.,* 161 N. C., 614; *Griffin v. Thomas,* 128 N. C., 310.

We see no sufficient cause to disturb the judgment and it is hereby Affirmed.

IN RE THE ESTATE OF E. G. DAVIS, DECEASED, AND IN RE THE ESTATE OF W. H. BURWELL, DECEASED.

(Filed 28 October, 1925.)

1. Taxation—Constitutional Law—Inheritance—Statutes.

An inheritance tax is in the nature of an excise tax, or one on acquiring property or inheriting from a decedent, and does not come within the prohibition as to taxing an income upon property when the property itself is taxed, Const. Art. V, sec. 3, and its imposition rests with the legislative power.

2. Same—Evidence—Tax Books.

The value of lands at the time of the testator's death is the basis upon which the inheritance tax is laid, and its value as ascertained by the local tax assessor, does not control, nor are the local tax books evidence in court of its real value for the purposes.

APPEAL from *Devin, J.,* at June Term, 1925, of VANCE.

Attorney-General Brummitt, Assistant Attorney-General Nash and Assistant Attorney-General Harwood for the State.

T. T. Hicks & Son for Admr. of Davis and Executors of Burwell.

CLARKSON, J. The above cases were consolidated, they present the same legal question.

The Department of Revenue of the State of North Carolina assessed the real estate, lately belonging to W. H. Burwell, who died in the year

1917, at $22,897.50, and the same department assessed the real estate, to wit, a storehouse, belonging to the estate of the late E. G. Davis, who died 13 April, 1922, at $36,000.00. Both said tracts of real estate, the one being a farm and the other a storehouse, were situated in Vance County, North Carolina. The farm of Mr. Burwell was valued for property taxation in the year 1917, by the taxing authorities at $10,775.00, and the storehouse belonging to the estate of E. G. Davis was valued for property taxation in the year 1922, by the lawful county authorities at $23,000.00.

The question is: Did the law in reference to inheritance tax give the right to increase the valuation of the real estate fixed by the county authorities? Appellants say "No," the Appellee says "Yes."

Article V, sec. 3, of the State Constitution is as follows: "Laws shall be passed taxing, *by a uniform rule,* all moneys, credits, investments in bonds, stocks, joint-stock companies, or otherwise; and, also, *all real* and personal property, according to its true value in money. The General Assembly may also tax trades, professions, franchises, and incomes, provided that no income shall be taxed when the property from which the income is derived is taxed." . . . (See Public Laws, 1925, Constitution of N. C., Art. V, sec. 3, amendment added.)

Appellants in their brief say that this provision has been held for 50 years to require all taxes levied upon property to be upon a uniform rule. This principle is sound. It is a wholesome provision—there should be no discrimination in taxation. All classes should be taxed alike, there should be no favorites, but equality and uniformity. Equal rights to all, special privileges to none. These are fundamental principles of all stable government. The only exemption from the uniform rule in the above article was that in regard to homes, submitted to the people under Public Laws of N. C., 1923, ch. 240, and adopted at the 1924 fall election. This was to encourage home owning, to make government more enduring by helping to create a land of home owners. The home is the foundation of our civilization. It is the slogan of the American Building & Loan Association: "The American home is the safeguard of American liberties." The principle contended for by appellants has no application in reference to inheritance taxes. The method provided in the Revenue Act of 1903, ch. 247, sec. 6-21 for the ascertainment, computation and collection of an inheritance, transfer or succession tax was held constitutional by a unanimous Court. *Brown, J.,* in an able and interesting opinion, *In re Morris' Estate,* 138 N. C., p. 261, says: "The inheritance or succession tax is of very ancient origin. It is no new invention of the legislative power for the purpose of putting money in the public coffers. Gibbon, the historian, traces its origin to the Emperor Augustus, and says it was suggested by him to the senate as a means

of supporting the Roman Army; that it was imposed at the rate of five per cent upon all legacies or inheritances above a certain value; but that it was not collected from the nearest relatives upon the father's side, and that the tax was the most fruitful as well as the most comprehensive. 1 Gibbon's Rome, 133; Encyc. Brit. 8th Am. Ed., 65, title Taxation. It was called *'vicessima hereditatum et legatorum.'* In this country the tax is variously called an inheritance tax, a legacy tax, a transfer tax, and a succession duty. It is defined as follows: 'A burden imposed by government upon all gifts, legacies, inheritances and successions, whether of real or personal property, or both, or any interest therein, passing to certain persons (other than those specially excepted) by will, by intestate law, or by deed or instrument made *inter vivos* intended to take effect at or after the death of the grantor.' Dos Passos, (2 ed.) sec. 2."

Ross on Inheritance Taxation (1912), part sec. 6, says: "Sometimes the inheritance tax is denominated an excise of duty upon the right or privilege of taking property by will or descent, in contradistinction to a direct tax on property. It 'is not a tax upon property or property rights in any sense, but purely an excise tax levied upon the transfer or transmission, and merely measured in amount by the amount of the property transferred.'" Part sec. 9, says: "Inheritance taxes are of ancient origin. Two thousand years ago they were imposed in Rome, the idea perhaps having been introduced from Egypt; and in the middle ages traces of such taxes were observable as an incident of feudal tenures. Today England, France, Germany—in fact, practically all the nations of Europe—have adopted some system of inheritance taxation; so, indeed, have many of the colonies of Great Britain, the Spanish-American countries, Japan, and other nations of the world. In the United States, before the end of the eighteenth century, the Federal Government began the taxation of inheritances."

It was adopted in Great Britain in 1780, in Pennsylvania in 1826, in New York in 1885, in North Carolina as early as 1847, and the present system, in part, in 1901. Public Laws, chap. 9, sec. 12 *et seq.*, and is now the law in almost every State in the Union. The other states and territories are: Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, New Hampshire, New Jersey, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Texas, Vermont, Virginia, Washington, West Virginia, Wisconsin, Wyoming, Maryland, Mississippi, Rhode Island, Utah, New Mexico, Philippine Islands, Porto Rico, Territory of Alaska and Territory of Hawaii.

The justice of the tax has been approved by almost all the nations of the earth and the states of the union.

In 26 R. C. L., part sec. 167 (p. 296), it is said: "An inheritance tax in any of its customary forms is not a tax on the property of the decedent with respect to which it is levied, but it is an excise imposed on the privilege of transmitting or receiving property upon the death of the owner, and consequently is not subject to any of the constitutional limitations upon taxes or property found in the State Constitution." And in part sec. 168 it is said: "In the absence of a special constitutional provision to the contrary there is no doubt that the levy of inheritance taxes is within the general discretionary power of the state legislatures to select the subjects of taxation, subject, of course, to the limitation of raising money for the public use only."

In 1 Cooley on Taxation (4 ed.), part sec. 48, p. 136, it is said: "An inheritance tax, also called a legacy or succession tax, is, in its common form, an excise on the privilege of taking property by will, or by inheritance or by succession in any other form upon the death of the owner. Such taxes are of great antiquity. They are indirect rather than direct taxes, and are in the nature of an excise tax rather than a property tax."

In 4 Cooley on Taxation (4 ed.), part sec. 1695, p. 3406, the following is laid down: "And succession to an inheritance may be taxed as a privilege, notwithstanding the property of the estate is taxed, and taxes on property are required by the constitution of the state to be uniform." *Gelsthrope v. Furnell,* 20 Mont., 229, 51 Pac., 267, 39 L. R. A., 170; *Eyre v. Jacob.* 14 Gratt. (Va.), 422. See *State v. Alston,* 94 Tenn., 674, 30 S. W., 750, 28 L. R. A., 178.

The tax levied is not a tax upon land, within the meaning of the Constitution; but it is an excise tax levied upon the succession or transfer or the right to transmit property.

It is not a natural right of a person to take property by devise or descent, but it is a creature of the law—a privilege by grace of the legislature. The inheritance tax not being a tax on land, the value of the land that is devised or descended can be ascertained or fixed by legislative will. Natural justice would require that the condition imposed must operate equally upon all in the same class. This is well settled law in this jurisdiction. *Pullen v. Comrs.,* 66 N. C., 363; *In re Morris' Estate, supra; S. v. Bridgers,* 161 N. C., 247; *Norris v. Durfey,* 168 N. C., 321; *In re Inheritance Tax,* 168 N. C., 356; *S. v. Scales,* 172 N. C., 915; *Corporation Commission v. Dunn,* 174 N. C., 679; *Bank v. Doughton,* 189 N. C., 50. The position taken in appellee's brief, we think, well stated and is the law: "All the statutes of North Carolina levying an inheritance tax from 1917 to 1925, inclusive,

fix the rate of tax at so much per cent 'for each one hundred dollars of the clear market value of such interest in such property.' Section 6, chapter 231, Laws of 1917, and section 6, chapter 34, Public Laws of 1921 (the acts particularly material to this discussion). It has been determined by this Court that the clear market value is to be ascertained as of the time of the death of the testator or intestate. *S. v. Bridgers, supra.* Manifestly, if the Department of Revenue should be bound by the valuation of the property of W. H. Burwell by assessors in 1915, this would be directly contrary to the provisions of the act upon which the value of such property should be appraised under the inheritance tax law. The method of appraisal and ascertainment of value has been approved in cases above cited, more particularly in *S. v. Bridgers.* The clear market value of a particular property in 1915, in very many instances would not be the clear market value of such property in 1917, and the clear market value of property in 1921, in many instances would not be the clear market value of property in 1922. The Court has fixed the period at which this clear market value is to be ascertained at the death of the testator or intestate. It is, therefore, in clear effect a determination that this clear market value must be ascertained as of that time. The value of property as ascertained by the tax list is not competent evidence to show the value of the land, as assessors are not witnesses in the case, sworn and subject to cross-examination in the presence of the jury. *Cardwell v. Mebane,* 68 N. C., 485; *Daniels v. Fowler,* 123 N. C., 35; *R. R. v. Land Co.,* 137 N. C., 330."

We cannot see under the plain language of the act, "clear market value," which is to be ascertained at the death of the owner, how the prior assessment can be binding. If we should so hold, we would nullify the written law. The fixed taxable value by the local authorities should have persuasive consideration with the appraiser and the Commissioner of Revenue. In the administration of law of this kind, due consideration should be given to local authorities who have had to, under oath, pass on similar matters. From a great wealth of authorities, we conclude that the contention of appellants cannot be sustained.

From a careful examination of the acts relevant here, the Legislature has taken the care to safeguard the administrator or executor, and from the appraisal, if not satisfactory, appeal lies and the machinery applicable.

The judgment below is

Affirmed.

STATE v. CHARLES BERRY.

(Filed 28 October, 1925.)

1. Constitutional Law — Criminal Law — Trial by Jury — Conviction— Verdict.

It is required by our organic law that with certain reservations conferred on the Legislature in case of misdemeanors, that for a lawful conviction of a crime a unanimous verdict must be rendered by a jury of twelve in open court, and a verdict of guilty rendered by a less number is unconstitutional. Const. of N. C., Art. I, sec. 13.

2. Appeal and Error—Record.

The record of the trial on appeal is to be observed in the Supreme Court as importing verity.

APPEAL by defendant from *Calvert, J.*, and a jury, at March Term, 1925, of ORANGE. New trial.

Defendant was tried and convicted of an assault with a deadly weapon upon Louis Porter and Charles Porter, and from the judgment upon such conviction appealed to the Supreme Court.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

Gattis & Gattis for defendant.

CLARKSON, J. In the record of the case sent to this Court, it appears that the jury which tried defendant was composed of only ten men.

The Constitution of North Carolina, Art. I, sec. 13, provides: "No person shall be convicted of any crime but by the unanimous verdict of a jury of good and lawful men in open court. The Legislature may, however, provide other means of trial for petty misdemeanors with the right of appeal."

Nash, C. J., in *S. v. Moss*, 47 N. C., p. 68, says: "These principles are dear to every freeman; they are his shield and buckler against wrong and oppression and lie at the foundation of civil liberty; they are declared to be *rights* of the citizens of North Carolina, and ought to be vigilantly guarded."

Ashe, J., in *S. v. Stewart*, 89 N. C., p. 564, says: "It is a fundamental principle of the common law, declared in 'Magna Charta,' and again in our Bill of Rights, that 'no person shall be convicted of any crime but by the unanimous verdict of a jury of good and lawful men in open court.' Art. I, sec. 13. The only exception to this is, where the Legislature may provide other means of trial for petty misdemeanors with the right of appeal—Proviso in same section."

In *S. v. Rogers,* 162 N. C., p. 659, *Brown, J.,* says: "It is elementary that a jury, as understood at common law and as used in our Constitutions, Federal and State, signifies twelve men duly impaneled in the case to be tried. A less number is not a jury. *Traction Co. v. Hof,* 174 U. S., 1." *S. v. Holt,* 90 N. C., 749; *S. v. Cutshall,* 110 N. C., 538; *S. v. Wood,* 175 N. C., 809; *Bartholomew v. Parrish,* 186 N. C., 85.

The record proper "imports verity." *S. v. Wheeler,* 185 N. C., p. 670; *S. v. Palmore,* 189 N. C., p. 538.

Waiver of certain privileges and rights was discussed recently by *Stacy, C. J.,* in *S. v. Hartsfield,* 188 N. C., p. 357, and we need not repeat here.

The defendant waived nothing, but insisted on his rights, as the record disclosed. It appearing by the record that the defendant was tried and convicted by ten men, the conviction was improper and no judgment could be rendered. For the reason given, there must be a

New trial.

W. P. TENNANT v. THE PEOPLES BANK, RECEIVER OF THE BANK OF MAXTON, MAXTON CONSOLIDATED GRADED SCHOOL, W. O. BENNETT ET AL., TRUSTEES OF SAID GRADED SCHOOL DISTRICT.

(Filed 28 October, 1925.)

1. Appeal and Error—New Trial.

Where there is error found on appeal as to one of the appealing defendants so interrelated as to affect the other's legal rights, a new trial will be ordered as to both.

2. Pleadings — Demurrer — Banks and Banking — Receivers — Unpaid Cashier's Check.

Where a bank gives a cashier's check in exchange for a check of its depositor, and afterwards becomes insolvent and is in the hands of a receiver, and the cashier's check has not been paid, the receiver must return the original check upon return of the cashier's check for which it was given, and upon demurrer to the complaint: *Held,* the issues upon conflicting evidence were for the jury to determine.

VARSER, J., not sitting.

APPEAL by defendants from *Grady, J.,* at May Term, 1925, of ROBESON. Reversed.

From judgment on the pleadings, upon motion of attorneys for plaintiff, in favor of plaintiff and against defendants, defendants appealed.

McIntyre, Lawrence & Proctor for plaintiff.
McKinnon & Fuller for Peoples Bank, receiver.
McLean & Stacy for Maxton Graded School District.

CONNOR, J. In their brief filed in this Court, attorneys for plaintiff, appellee, say: "After an examination of the authorities, candor and frankness compel us to admit that in our opinion the court was in error in rendering judgment against the school board upon the pleadings, and we therefore concede that as to the school board the case should be sent back for a new trial to the end that the facts may be developed and the controverted facts found by a jury."

Plaintiff contends, however, that the judgment as rendered against the Peoples Bank, receiver, is correct and should be affirmed. If there is error in the judgment against the school board, entitling it to a new trial, it must follow that a new trial must be had as to the Peoples Bank, receiver, also. The right of plaintiff to the relief prayed for in this action, and decreed as against the Peoples Bank, receiver, is dependent upon the cause of action set up by plaintiff against the school board. If the check of the school board to plaintiff, on account, was paid by the Bank of Maxton, the drawee, by its cashier's check on Murchison National Bank of Wilmington, plaintiff is not entitled to the relief prayed for against the Peoples Bank, receiver. If, however, this check was not paid, by reason of the facts alleged, by the cashier's check on Murchison National Bank, plaintiff, upon return by him of the cashier's check, is entitled to the return by the Peoples Bank, receiver, to him of the check of the school board.

We concur with the frank and candid admission of plaintiff's attorneys. The judgment upon the pleadings must be reversed to the end that appropriate issues raised by the pleadings may be submitted to a jury.

Upon the call of this case for argument in this Court, defendants demurred *ore tenus,* on the ground that no cause of action is alleged in the complaint. The demurrer is overruled.

If the allegations in the complaint are sustained by the evidence, and the jury shall find that the check for $3,500, given to plaintiff by the school board, was not paid upon presentation to the Bank of Maxton, drawee, the plaintiff will be entitled to recover upon a verdict upon appropriate issues in favor of plaintiff. *Bank v. Barrow,* 189 N. C., 303, and *Graham v. Warehouse,* 189 N. C., 533, are not controlling as authorities against plaintiff's right to recover. The judgment must be

Reversed.

VARSER, J., not sitting.

IDA WILLIAMS, ADMINISTRATRIX OF ED. C. WILLIAMS, DECEASED, v. ATLANTIC COAST LINE RAILROAD COMPANY AND THE GARYSBURG MANUFACTURING COMPANY.

(Filed 28 October, 1925.)

1. Employer and Employee — Master and Servant — Negligence — Evidence—Nonsuit.

Upon motion to nonsuit in an action to recover damages for the negligent killing of plaintiff's intestate, an employee of defendant corporation, it is reversible error to grant defendant's motion as of nonsuit upon the grounds that the intestate had borrowed the truck upon which he met his death, when there is further evidence that his employer had furnished the truck to plaintiff and other employees for going to and from their work, and it was under its control at the time of the accident that inflicted the negligent injury.

2. Same—Appeal and Error.

In an action against an employer and a railroad company to recover damages for the negligent killing of plaintiff's intestate in a collision between a truck driven by a coemployee at the time of his death and the train of the defendant railroad company, with evidence tending to show that the truck was being driven in the service of the employer, and per *contra*, it is reversible error for the trial judge to instruct the jury that any negligence of the driver was attributable to plaintiff's intestate.

APPEAL by plaintiff from *Dunn, J.*, at March Term, 1925, of PENDER.

Civil action to recover damages for the wrongful death or negligent killing of plaintiff's intestate.

There was a judgment of nonsuit entered at the close of plaintiff's evidence exculpating the Garysburg Manufacturing Company from liability; and on the usual issues of negligence, contributory negligence and damages being submitted as between the plaintiff and the Atlantic Coast Line Railroad Company, the jury answered the first two in the affirmative. Judgment accordingly. The plaintiff appeals from both judgments, assigning errors.

E. K. Bryan and C. E. McCullen for plaintiff.
Rountree & Carr for Atlantic Coast Line Railroad Co.
Herbert McClammy for Garysburg Manufacturing Company.

STACY, C. J. Defendants earnestly contend that the nonsuit in favor of the Garysburg Manufacturing Company should be sustained and that the verdict in favor of the Atlantic Coast Line should be upheld, but we think there was more than a scintilla of evidence offered on the hearing tending to establish the plaintiff's position as against both defendants, which was sufficient to carry the matters to the jury for its consideration and determination.

It is now the settled rule of practice in this jurisdiction that, on a motion to nonsuit, the evidence which makes for the plaintiff's claim and which tends to support her cause of action, whether offered by the plaintiff or elicited from the defendant's witnesses, will be taken and considered in its most favorable light for the plaintiff, and she is entitled to the benefit of every reasonable intendment upon the evidence, and every reasonable inference to be drawn therefrom. *Christman v. Hilliard,* 167 N. C., p. 6; *Nash v. Royster,* 189 N. C., 408.

Plaintiff's intestate, Ed C. Williams, and other employees of the Garysburg Manufacturing Company, were going from Burgaw, Pender County, to Long Creek, a distance of about ten miles, in a truck belonging to the manufacturing company, when a collision occurred between said truck and a passenger train of the Atlantic Coast Line Railroad Company, resulting in the death of plaintiff's intestate and injuring several others.

The nonsuit in favor of the manufacturing company was allowed upon the theory that the truck in question had been borrowed by plaintiff's intestate and was being operated under his direction and control at the time of the collision by one Connie Williams. Defendant contends that plaintiff's intestate was engaged in transporting laborers from the Long Creek section to Burgaw on his own responsibility and that it was distinctly understood between them that no liability should attach to the defendant, manufacturing company, by reason of the use of its truck. There was evidence tending to support this view of the case.

Plaintiff, on the other hand, takes the position that the laborers were being transported by the defendant, manufacturing company, and for its benefit. As bearing on this phase of the case, Connie Williams testified as follows:

"I live at Long Creek, and Ed Williams lived at Long Creek. About 17 or 18 of us lived in the Long Creek section, about 9 or 10 miles from Burgaw. The Garysburg Company furnished the truck for us to go back and forth home and back here to our work. Once a week I drove the truck for that purpose, every Saturday night and Monday morning. We had to come to Burgaw before we went to work, and were required to be there at 5:30; then we got on the train and went in the woods, about 10 miles, where we were working. Saturday evening when we got back and got our pay we went home on the truck. . . . We all worked for the Garysburg Company.

"On this evening I got the truck out of the house near the office—the Garysburg Company exercised dominion over that property—and I drove it down here and got some gas, over at Mr. Davis', did some shopping and started home. I did not pay for the gas, nor did anyone riding in the truck pay for it; it was charged to the company."

We think this evidence was sufficient to carry the case to the jury under the principle announced in *Tanner v. Lumber Co.*, 140 N. C., 475, and contended for by plaintiff in the present action, that where the master undertakes to furnish his laborers transportation to and from their work, it is his duty, in the exercise of ordinary care, to see to it that such transportation is rendered as reasonably safe as the character of it will permit. See note to *Thomas v. Wisconsin C. R. Co.*, as reported in 23 L. R. A. (N. S.), 954, where the authorities on the subject are collected and reviewed by the annotator.

A new trial must also be awarded as between the plaintiff and the Atlantic Coast Line Railroad Company, because of the following instruction on the issue of contributory negligence:

"And you will bear in mind, in considering the facts upon this issue, that any negligence with which you fix Connie Williams, the driver of said car, would be, and is to be, imputed to Ed Williams, the plaintiff's intestate." Plaintiff excepts.

If the plaintiff's view of the case be accepted by the jury, then this instruction was erroneous under the doctrine announced in *Pusey v. R. R.*, 181 N. C., 137, *White v. Realty Co.*, 182 N. C., 536, *Williams v. R. R.*, 187 N. C., p. 355, and other cases.

While not material to this appeal, the testimony of one of the witnesses, D. D. McAllister, a colored minister, probably ought not to be lost in the record. He said that Connie Williams drove the truck in question down Courthouse Avenue and approached the railroad track at "a very slow, melancholy speed."

There is no contention that the driver of the truck stopped before entering upon the railroad track, but this was on 24 December, 1922, prior to the enactment of the North Carolina "Stop Law," chap. 255, Public Laws 1923, which became effective 1 July, 1923.

The nonsuit will be reversed and a new trial awarded.

New trial.

C. L. WILLIAMS, RECEIVER OF THE COMMERCIAL NATIONAL BANK OF WILMINGTON, N. C., v. FRED H. COLEMAN AND L. F. MITCHELL.

(Filed 28 October, 1925.)

1. Banks and Banking — Receiver — Depositor — Debtor and Creditor— Dividends—Endorsers.

Where a bank has discounted a negotiable note in due course before maturity with endorsement thereon, and has arranged with the endorser, secondarily liable, C. S., 3047, that he will keep on deposit a sufficient sum to pay the instrument when it should become due, and thus to be

paid therefrom, the receiver of the bank appointed after the maturity of the note stands in the same relation to the surety as the bank, or as both debtor and creditor of the surety, and as such may charge the note to the depositor's account less whatever distributive parts of the assets of the bank may be available and apportionable thereto.

2. Appeal and Error—Issues.

Issues tendered that are immaterial to the determination of the controversy in an action, are properly refused by the court.

APPEAL by plaintiff from *Dunn, J.*, at April Term, 1925, of NEW HANOVER. No error.

Action to recover upon note for $260, executed by defendant, Coleman, and payable to defendant, Mitchell. Mitchell transferred this note, by endorsement, for value and before maturity to the Commercial National Bank of Wilmington, N. C. Plaintiff is receiver of said bank, and has the note, which matured before his appointment on 29 December, 1922, in his possession as an asset of said bank. No payment had been made on said note prior to plaintiff's appointment as receiver. Subsequent thereto, a dividend on the deposit of defendant Mitchell in said bank, amounting to $59.86, was applied by plaintiff, with the consent of Mitchell, as a payment on said note. This application was made because of Mitchell's liability as an endorser.

This action was commenced on 13 January, 1925, against Fred H. Coleman, maker of said note, to recover $200.14, balance due thereon. On 26 January, 1925, upon motion of defendant Coleman, supported by his affidavit that he had paid the amount of the note to L. F. Mitchell, payee therein, the said L. F. Mitchell was made a party defendant.

At date of plaintiff's appointment as receiver, defendant Mitchell had on deposit in said bank the sum of $598.60. He alleges that when he first requested the bank to discount said note, it declined to do so; that subsequently he agreed with said bank that if it would discount said note, he would deposit, and keep on deposit therein, until the same was paid, a sum of money in excess of the amount of the note, and that if Coleman, the maker, did not pay the note at maturity the bank should have authority to charge the same to his account as a depositor; that the bank thereupon discounted the note; that he has fully complied with said agreement, and at date of plaintiff's appointment had on deposit the sum of $598.60, in accordance therewith. Plaintiff in his reply denies these allegations.

Since the appointment of plaintiff as receiver, Coleman has paid the amount due on the note to Mitchell; he alleges that he was induced to make said payment by certain false and fraudulent representations made to him by Mitchell; he demands judgment that plaintiff's action

as to him be dismissed and that judgment be rendered that plaintiff recover the amount due on the note of defendant Mitchell. Defendant Mitchell denies the allegations in the answer of his codefendant, and pleads his deposit as a counter-claim and set-off to the note.

The issues submitted to the jury, with their answers, are as follows:

1. At the time the Coleman note was discounted by defendant Mitchell, at the Commercial National Bank, did he have the understanding and agreement with said bank as alleged in the answer? Answer: "Yes."

2. Was defendant Coleman insolvent at the time of the failure of the Commercial National Bank on 29 December, 1922? Answer: "Yes."

Upon this verdict, it was adjudged that the note be and the same is canceled, and that plaintiff recover nothing thereon; that defendant Mitchell's claim of $598.60 against plaintiff receiver be charged with $260 as of 29 December, 1922, reducing said claim to the amount of $338.60; that defendant, Mitchell, recover of plaintiff receiver the said sum of $338.60, and that said receiver account to said Mitchell for dividends on that sum.

From this judgment plaintiff appealed to the Supreme Court.

Rountree & Carr and Rodgers & Rodgers for plaintiff.
Weeks & Cox for defendant, Mitchell.

CONNOR, J. Plaintiff's first assignment of error is the refusal of the court to submit to the jury certain issues tendered by him. These issues arise in the cross-action set up in his answer by defendant Coleman against his codefendant Mitchell. They are not material to or determinative of the action of plaintiff against defendant Mitchell. Payment by Coleman, the maker, to Mitchell, the payee, of the note, the same having been transferred by Mitchell by endorsement to the bank for value and before maturity, is not a defense to the action of the plaintiff receiver against Coleman on the note. Coleman does not rely upon such payment as a defense, and in his answer does not deny liability to plaintiff.

If the defense relied upon by Mitchell is not sustained, plaintiff is entitled to judgment on the note against Coleman, as maker and against Mitchell as endorser. The issues submitted were determinative of this defense. There was no error in refusing to submit the issues tendered by plaintiff.

Plaintiff assigns as error the instruction by the court to the jury as follows:

"The court charges you as a matter of law, that if Mitchell did have the agreement with the bank, as alleged, he would be entitled to require the bank to take payment for the $260 note out of the deposit of

$400, which was left there for that purpose, if you find by the greater weight of the evidence that there was such an agreement."

At the date of plaintiff's appointment as receiver, defendant, Mitchell, by reason of his deposit, was a creditor of the bank; by reason of his liabilty to the bank, as endorser, and under the agreement with the bank, as found by the jury, he was also a debtor. Prior to the maturity of the note, Coleman was primarily liable, and Mitchell liable only as endorser, C. S., 3047. Demand, notice of protest and nonpayment were waived by the endorser. At its maturity, the bank was authorized to charge the note to Mitchell's account as depositor, because of his liability as an endorser, with qualifications, as well as under the special agreement. Under the agreement, he had sufficient funds in the bank for the payment of the note, in full, deposited and kept there for that purpose. He had no right, prior to the maturity of the note, to withdraw said funds. Coleman having failed to pay the note, at maturity, Mitchell's deposit was immediately available for that purpose. As between Mitchell and the bank the note was paid at date of the bank's insolvency.

The right to a set-off against the receiver of a bank is to be governed by the state of things existing at the moment of insolvency and not by conditions thereafter created. 7 C. J., 746. When a receiver comes to make a settlement with a creditor of the bank he should deduct from his credit all sums for which he is a debtor, and when he settles with a debtor he should allow him credit for sums for which he is a creditor of the bank. This Court has held this rule to be in accordance with equity and justice. *Davis v. Mfg. Co.,* 114 N. C., 321; 23 L. R. A., 322; *Graham v. Warehouse Co.,* 189 N. C., 533.

"Where a depositor in an insolvent National bank had endorsed a note on which he was in fact primarily liable, and procured the bank to discount it for his benefit, he was entitled in a suit by the bank's receiver to recover the amount of the note, to set off his deposit in the bank against his liability on the note." *Williams v. Rose,* 218 Fed., 898; *Yardley v. Cothic,* 51 Fed., 506, 17 L. R. A., 462; *Scott v. Armstrong,* 146 U. S., 499, 36 L. Ed., 1059; *Yardley v. Philler,* 167 U. S., 346, 42 L. Ed., 192.

Funds for the payment of the note having been deposited with the bank, by defendant Mitchell, immediately available for that purpose at its maturity, prior to the insolvency of the bank, plaintiff is not entitled to recover on the note as against defendant Coleman. There was no error in the instruction of the court. Mitchell, payee of the note, having paid the bank, was entitled to the return of the note and to collect the same from Coleman, the maker.

The judgment is affirmed. We find

No error.

ANNIE BRYANT AND J. H. BRYANT, HER HUSBAND, *v.* WILLIE BRYANT ET AL.

(Filed 28 October, 1925.)

1. Descent and Distribution—Heirs—Widow—Statutes.

The estate of a deceased husband is cast upon his widow as his heir only when there are no other lawful heirs. C. S., 1654.

2. Same—Illegitimate Children.

Under Rule 10, of Descent, where an illegitimate son has married, leaving surviving illegitimate brothers and sisters of the same mother, they may collaterally inherit the estate under the provisions of C. S., 1654, and the inheritance cannot be cast upon his surviving widow, as his heir. C. S., 1654. Canon 13 of Descent has no application.

VARSER, J., not sitting.

APPEAL by the defendants from *Grady, J.*, at May Term, 1925, of ROBESON.

Petition for the sale of land for partition heard upon the following agreed statement of facts:

That Ned Faulk and Maria Faulk were slaves belonging to Col. Hinnard Faulk and that they lived together as man and wife during slavery. That it is admitted that such cohabitation by slavery was not recognized as a legal marriage under the law; that this cohabitation continued until about 1857; that about that year Ned Faulk was sold as a slave to a person living in Alabama and was carried by such purchaser to Alabama and never returned; that to the above cohabitation the following named children were born prior to the time that Ned Faulk was sold and carried to Alabama: Beadie Faulk, Isham Faulk, Archie Faulk, Letzy Faulk, Miles Faulk; Tom Godwin; that Tom Godwin was originally a Faulk, but was given by Col. Faulk to his son-in-law, Berry Godwin, and thereafter Tom Faulk took the name of Tom Godwin. That the above-named full brothers and sisters of Tom Godwin died previous to the said Tom Godwin and some time after 1885, and before 1900; that the above-named brothers and sisters of Tom Godwin each left legitimate children born in lawful wedlock; and that these children and their heirs, and their lawful issue, are named and set forth in the amended petition filed in this cause, and, as such children, claim to be heirs at law of Tom Godwin, as their uncle and great uncle, and claim the property described in the petition.

That on 28 January, 1880, Tom Godwin married Mary Ann Gilmore; that at the time of this marriage Mary Ann Gilmore by her former husband named Gilmore, was the mother of Julia Gilmore and Willie Ann Gilmore, sometimes called Willie Ann Godwin, who are

now in the possession of the lands described in the petition; that in 1882 Tom Godwin purchased the lands described in the petition from Berry Godwin and others, and that the said Tom Godwin and wife, Mary Ann Gilmore, lived on the said lands up until his death, which occurred about the year 1909, without lawful issue or children, leaving his widow, Mary Ann Godwin, and her two children by her former husband, to wit, Julia Gilmore and Willie Ann Gilmore, sometimes called Willie Ann Godwin, surviving him, who remained in possession of said lands thereafter up until the time of the death of his widow, Mary Ann Godwin, which occurred in the spring of 1923; that since her death her children by her first husband, Gilmore, to wit, the said Willie Ann Godwin and Julia Gilmore, have been in continued possession up until the institution of this action, and are still in possession of said lands, and have paid the taxes thereon. That Tom Godwin left no will.

That upon the foregoing statement of facts the petitioners, and those defendants who are the children and heirs at law of the brothers and sisters of Tom Godwin, claim to be the owners in fee and entitled to the immediate possession of the lands described in the amended petition.

That upon the foregoing statement of facts the defendants, Julia Gilmore and Willie Ann Godwin, claim that their mother, Mary Ann Godwin, under Rule No. 8 of the statutes of descent, was the lawful heir of said Tom Godwin, deceased, and inherited the lands in controversy, that upon her death Julia Gilmore and Willie Ann Gilmore, as her lawful children and heirs at law, inherited said lands from the said Mary Ann Godwin and said lands immediately descended to them.

Judgment was rendered against the appellants and in favor of the appellees, declaring their interest in the land and ordering a sale for partition. Appellants excepted and appealed.

McLean & Stacy, McKinnon & Fuller and Johnson, Johnson & McLeod for plaintiffs.

Britt & Britt for defendants.

ADAMS, J. On 28 January, 1880, Tom Godwin married Mary Ann Gilmore, who, by a former husband, was the mother of the appellants, Julia Gilmore and Willie Ann Gilmore. In 1882 he purchased the land in controversy and died without lawful issue in 1909. Mary Ann Gilmore died in 1923. The appellants are in possession of the land and claim title thereto under Rule 8 of the Canons of Descent: "When any person dies leaving none who can claim as heir to him, his widow shall be deemed his heir and as such shall inherit his estate." C. S., 1654. The specific question, then, is this: Did the title acquired by Tom Godwin vest, upon his death, in the legitimate issue of his

illegitimate brothers and his illegitimate sisters, as contended by the appellees, or in his widow, Mary Ann Godwin, as contended by the appellants?

In express terms Rule 8 provides that the widow shall be heir only when there is no one else who can claim as heir. *University v. Markham,* 174 N. C., 338; *Powers v. Kite,* 83 N. C., 156. If, then, the representatives of Tom Godwin's illegitimate brothers and illegitimate sister may inherit from him, his widow if living would be excluded and her children will be barred.

It is perfectly clear that Rule 13 has no application to the facts, for it confers the right of inheritance upon the children only as to the estate of their parents; not as to collaterals. *Tucker v. Bellamy,* 98 N. C., 31; *Tucker v. Tucker,* 108 N. C., 236; *Bettis v. Avery,* 140 N. C., 184; *Croom v. Whitehead,* 174 N. C., 305. The appellees admit this and say that the descent was cast upon them by virtue of Rule 10: "Illegitimate children shall be considered legitimate as between themselves and their representatives, and their estates shall descend accordingly in the same manner as if they had been born in wedlock. And in case of the death of any such child or his issue, without leaving issue, his estate shall descend to such person as would inherit if all such children had been born in wedlock: *Provided,* that when any illegitimate child dies without issue, his inheritance shall vest in the mother in the same manner as is provided in Rule 6 of this chapter." C. S., 1654.

This rule has been construed in a number of decisions. In *Powers v. Kite, supra, Ashe, J.,* who wrote the opinion for the Court, said: "This rule has received an interpretation by repeated decisions of this Court, which it is now too late to controvert. The construction given to the rule is, that if an illegitimate or natural-born child shall die intestate without leaving any child or children, his or her estate shall descend to and be equally divided among his or her brothers and sisters, born of the body of the same mother, and their representatives, whether legitimate or illegitimate, in the same manner and under the same regulations and restrictions as if they had been born in wedlock." It will be noted that in this quotation the words "whether legitimate or illegitimate" follow the words "and their representatives"; but in *Tucker v. Tucker, supra, Clark, J.,* held that while the rule allows illegitimate children to be legitimate as between themselves and their representatives, it contemplates that such representatives shall themselves be legitimate representatives of the illegitimate child. In the statement of facts, however, it is admitted that the brothers and the sister of Tom Godwin each left children born in lawful wedlock and that the legitimate representatives claim as his heirs at law. Under these

circumstances the appellees hold the title acquired by Tom Godwin and are entitled to the relief demanded. In addition to the cases cited see, also, *Ashe v. Mfg. Co.*, 154 N. C., 241; *McBryde v. Patterson*, 78 N. C., 412; *Flintham v. Holder*, 16 N. C., 345.

The judgment is

Affirmed.

VARSER, J., not sitting.

CAPE FEAR RAILWAYS, INCORPORATED, v. MARION COBB, HOWELL COBB, PARTNERS, FIRST TRADING UNDER THE NAME OF THE RALEIGH MOTOR SALES, AND SUBSEQUENTLY UNDER THE NAME OF THE RALEIGH F. W. D. SALES COMPANY, MARION COBB, INDIVIDUALLY, AND THE FOUR WHEEL DRIVE AUTO COMPANY.

(Filed 28 October, 1925.)

1. Appeal and Error—Dismissal—Process—Fragmentary Appeal.

An appeal may be taken from the refusal of the trial judge to set aside a judgment for lack of service of process, and the appeal is not objectionable as fragmentary.

2. Process—Summons—Service—Principal and Agent—Statutes.

A local agency for a foreign corporation acting as its general sales agent, and collecting and receiving money in such capacity, is of such character as to make it an agency upon which service of summons for the foreign corporation can be made under our statute, C. S., 483; but if not, valid service may be made under the provisions of and in conformity with our statute, C. S., 1137, by service of summons on the Secretary of State, etc., if it appear that the defendant is doing business in this State without appointing a local process agent.

APPEAL by The Four Wheel Drive Auto Company from *Grady, J.*, at chambers, 1 July, 1925. From CUMBERLAND.

Civil action to recover damages for false warranty, breach of contract, etc., in connection with certain gasoline railway equipment purchased by plaintiff from the appealing defendant.

In apt time The Four Wheel Drive Auto Company, through counsel, entered a special appearance and moved to dismiss the action as to it for want of jurisdiction for that it had not been brought into court by any proper service of summons.

From the overruling of this motion, the said defendant noted an exception and appealed.

Cansler & Cansler and Dye & Clark for plaintiff.

Manning & Manning for defendant, Four Wheel Drive Auto Co.

STACY, C. J. The plaintiff, *in limine,* moved to dismiss the appeal as fragmentary in that it is from a refusal to dismiss the action for defective service of process, and relies upon the following cases as controlling authorities for its position. *Comrs. v. Scales,* 171 N. C., p. 527; *Clements v. R. R.,* 179 N. C., 225; *Capps v. R. R.,* 182 N. C., 758.

Plaintiff's motion must be denied. The appeal, it will be noted, is from an order overruling a motion to dismiss, not upon the ground of irregular or defective service of summons, but for an alleged failure of any valid service of process at all, resulting in a want of jurisdiction over the defendant. *Motor Co. v. Reaves,* 184 N. C., 260. Appeals from similar rulings were entertained in *Lunceford v. Accident Asso., ante,* 314 and *Accident Co. v. Davis,* 213 U. S., 245. The cases cited by plaintiff are not at variance with this position.

The appeal presents the single question as to whether The Four Wheel Drive Auto Company, a foreign corporation with its principal place of business at Clintonville, Wisconsin, has been brought into the Superior Court of Cumberland County by any valid service of process. This was attempted in four ways:

1. By service of summons on Marion Cobb and Howell Cobb, trading as Raleigh F. W. D. Sales Company, general agents of The Four Wheel Drive Auto Company. C. S., 483; *Whitehurst v. Kerr,* 153 N. C., 76.

2. By service of summons on George H. Irish, agent of The Four Wheel Drive Auto Company.

3. By warrant of attachment on funds in the hands of the Page Trust Company, trustee, it being alleged that such funds were the property of The Four Wheel Drive Auto Company, and by service of summons by publication. *Jenette v. Hovey,* 182 N. C., 30.

4. By service of summons on W. N. Everett, Secretary of State, and having him mail a true copy to the president, secretary or other officer of the corporation, it being alleged that The Four Wheel Drive Auto Company is a foreign corporation, doing business in North Carolina without complying with the provision of C. S., 1137, requiring the presence of a process officer or agent in this State. *Lunceford v. Accident Asso., supra.*

We think it is unnecessary to consider more than the first method as above set out. It is provided by C. S., 483, that in an action against a foreign corporation, brought by a resident of this State, service of summons may be had by delivering copy to the "managing or local agent thereof." And any person receiving or collecting money in this State for a corporation is a local agent for the purpose of this section. It has been held that this authority to receive money is not

the only test of a local agent upon whom service of process could be made. This language was not intended to limit the service to such class of agents, but rather to extend the word "agent" to embrace them. The authority to receive money, of itself, makes one a local agent for the purpose of the statute, but this is not the exclusive test of agency. *Copland v. Tel. Co.*, 136 N. C., 12.

The defendant offers an affidavit of Marion Cobb in which he deposes and says: "That he is manager of the Raleigh F. W. D. Sales Company; that the said Raleigh F. W. D. Sales Company are distributors for the State of North Carolina for The Four Wheel Drive Auto Company of Clintonville, Wis." Note, affiant does not simply say that the Raleigh F. W. D. Sales Company is distributor in this State of the goods manufactured by the appealing defendant, but he avers that said sales company is state distributor for The Four Wheel Drive Auto Company. He who acts as distributor for another and not merely as distributor of goods manufactured by the other, acts as his agent. And while the written contract between The Four Wheel Drive Auto Company and the Raleigh F. W. D. Sales Company, dated 19 July, 1921, declares the relation between the two to be that of "manufacturer" and "dealer," it appears from the affidavit of Marion Cobb, made subsequent to the execution of this contract, that, as distributor for The Four Wheel Drive Auto Company, the Raleigh F. W. D. Sales Company acted for the appealing defendant in some, if not all, of the negotiations out of which this action arose. The decisions in *McMasters, Inc., v. Chevrolet Motor Co.*, 3 Fed. (2d), 469, and *Gile v. Interstate Motor Car Co.*, 27 N. D., 108, L. R. A., 1915 B, p. 109, cited by appellant, are not at variance with this position.

But if service on the Raleigh F. W. D. Sales Company were not sufficient, it clearly appears from the record that the appealing defendant is "doing business in this State," within its power of regulation (*Browning v. Waycross*, 233 U. S., 16), and we have held in a number of cases that a foreign corporation doing business in North Carolina without complying with the provision of C. S., 1137, requiring the appointment of a local process officer or agent, was subject to service of process, according to the terms of said section, by leaving a true copy thereof with the Secretary of State and having him mail a copy to the president, secretary or other officer of the corporation upon whom, if residing in this State, service could be made. *Lunceford v. Accident Asso., supra*, and cases there cited. So that if the Raleigh F. W. D. Sales Company be not a local agent of The Four Wheel Drive Auto Company, upon whom service of process may be had, in a suit brought by a resident of this State, then we think process in an action against the appealing defendant could be served on the Secretary of State as

provided by C. S., 1137. *Currie v. Mining Co.*, 157 N. C., 209. The plaintiff has pursued both methods in the present proceeding.

The defendant, Marion Cobb, alone moved to vacate the warrant of attachment upon the ground that the funds attached belonged to him and not to The Four Wheel Drive Auto Company, but this was overruled and he has not appealed. Hence, we need not consider this phase of the case. Of course, if such funds do not belong to the appealing defendant, it has no interest in the attachment proceeding.

Upon the record, we think The Four Wheel Drive Auto Company has been brought into court under valid service of summons.

Affirmed.

A. M. STEVENS ET AL. v. LLOYD K. WOOTEN ET AL.

(Filed 28 October, 1925.)

1. Deeds and Conveyances—Gifts—Purchaser—Remainders—Contingent Estates.

Under a deed of gift of lands from a father to his son with contingent limitation over to the issue of another son, in the event the former should die without issue, the limitation over is not to the heirs general, but to the children who take on the happening of the contingency which would divest the title of the first taker, and where this contingency has happened and the estate goes over to the contingent remainderman, the latter takes from the grantor under the deed. C. S., 1654, Rule 4.

2. Same—Repugnancy.

A deed of gift from the father to the son in the granting clause in fee, and later in the same conveyance to the issue of another of his sons upon contingency, the two clauses of the deed will not be construed as repugnant to each other but to carry out the intent of the testator upon the happenings of the contingency; and a charge upon the profits of the lands for the support of the grantor will not affect the result.

APPEAL by plaintiffs from *Midyette, J.*, at March Term, 1925, of SAMPSON.

The parties agreed upon the following statement of facts:

1. That on and prior to 21 December, 1847, the lands in controversy belonged to Redding Williams, on which date he sold and conveyed the same, for a valuable consideration, to Francis Pugh, by deed recorded in deed book 30, p. 192, of the register's office of Sampson County.

2. That Francis Pugh married Mary Ann Stevens, née Mary Ann Kirby, and widow of Joseph Stevens.

3. That by her first marriage to Joseph Stevens the said Mary Ann Stevens had one child, namely, Joseph W. Stevens, and the plaintiffs are the children and heirs at law of the said Joseph W. Stevens.

4. That by her second marriage to Francis Pugh the said Mary Ann Pugh had four children, namely, Thos. K. Pugh, James H. Pugh, Carrie Pugh Fordham and Mollie Pugh Wooten.

5. That Thomas K. Pugh died intestate and without issue 29 March, 1868; that Carrie Pugh Fordham died intestate and without issue; that Mollie Pugh Wooten died intestate, leaving as her heirs at law the defendants, L. K. Wooten and J. Frank Wooten; that James H. Pugh subsequently died, unmarried and without issue, on September, 1922.

6. That L. K. Wooten and J. Frank Wooten are joint administrators upon the estate of their mother, Mollie P. Wooten, and J. Frank Wooten, also administrator upon the estate of James H. Pugh.

7. That Francis Pugh, by deed, dated 18 December, 1866, and recorded in Deed Book 36, p. 540, conveyed the land in controversy to James H. Pugh, upon the terms and limitations set out in said deed, which deed is hereby referred to and the same in its entirety is incorporated as a part hereof.

8. That, over the exception of the defendants as to the legal effect of it, there was offered for the consideration of the court the will of William Kirby, item four, as appears by record of wills, Book 1, p. 271, which item four is here referred to and incorporated as a part hereof.

9. That if the plaintiffs are entitled to recover anything in this action they are entitled to judgment against the defendants in the sum of one-half of $14,400 or ($7,200), with interest thereon from September, 1922, the date of the death of James H. Pugh.

Upon the foregoing facts it was adjudged that the plaintiffs have no interest in the lands or in the proceeds derived from the sale and that said proceeds are the sole property and estate of the defendants. The plaintiffs excepted and appealed.

Graham & Kennedy, Faircloth & Fisher and Fowler & Crumpler for plaintiffs.

Henry E. Faison and Cooper, Whitaker & Allen for defendants.

ADAMS, J. As to James H. Pugh or Thomas K. Pugh is the conveyance from Francis Pugh, dated 18 December, 1866, a deed of gift or a deed of purchase? Upon the principle that title to land acquired by a deed of gift from an ancestor is classed with title acquired by descent or devise the plaintiffs admit that if the conveyance is a deed of gift they are not entitled to recover. C. S., 1654, Rule 4.

This deed was construed in *Pugh v. Allen,* 179 N. C., 307, in which the limitation over "in case the said James H. Pugh should die without

an heir" was interpreted as meaning "not his heirs general, but his issue in the sense of children and grandchildren, etc., living at his death." *Mr. Justice Hoke,* who wrote the opinion, said also: "This, then, being the correct interpretation of the present deed, on the death of the plaintiff and grantee, James H. Pugh, without issue, which now appears to be altogether probable, the estate would go over to the heirs of Thomas K. Pugh, deceased, of the blood of the first purchaser, and these would take and hold not under the proposed vendor, but as heirs of Thomas K. under the deed from Francis, the grantor, and, on the death of James H., without issue living at his death, his deed would be of none effect. *Sessoms v. Sessoms,* 144 N. C., 121; *Smith v. Lumber Co.,* 155 N. C., 389. We are not inadvertent to the position argued for plaintiff that the limitation over is void as being repugnant to the portion of the deed carrying to plaintiff an estate in fee, but putting aside this fact that the limitation is stated as a part of the consideration of the deed and expressed in the form of a condition, the two clauses are not repugnant in the sense that one is destructive of the other, but, under the rule of interpretation heretofore stated, the limitation should be properly held as a qualification of the granting clause, and showing that the intent of the grantor is not to convey a fee simple absolute, but a fee defeasible, as his Honor ruled."

The plaintiffs contend that the insertion of the words "of the blood of the first purchaser" was *obiter* and in no way material to the decision, as no question had then been raised as to whether the deed was executed as a gift or a purchase. It is by no means clear that this clause is only a *dictum.* Indeed, it seems purposely to have been made a material part of the opinion, determining the course of the limitation over in case James H. Pugh should die without issue living at the time of his death; for this contingency is referred to in the opinion as "altogether probable"; and according to a statement in the agreed facts it has since become a reality.

Further, the plaintiffs say that the deed should be construed as a bargain and sale for value for the reason that it recites several considerations. Love and affection and a nominal sum of money are hardly sufficient. *Harper v. Harper,* 92 N. C., 300; *Powell v. Morisey,* 98 N. C., 426. The reservation of a right "to draw from the land such portion of the crops as the grantor should deem sufficient for his sustenance" is not inconsistent with a deed of gift; and the alleged consideration of a limitation over has been construed to be nothing more than a qualification of the granting clause. *Pugh v. Allen, supra.* To understand the provision for the grantee's release of his interest in the land devised to Mary Ann Pugh, it is necessary to refer to item 4 in the will of William Kirby:

"I give, devise and bequeath unto my daughter, Mary Ann Pugh, during her natural life my negroes, Isaac, Surcy, Crecy, Ned, Tilpha, Haywood, Clane and Cherry; also all the land I purchased of Salmon Strong and wife, except so much as is hereinbefore given to my son, William Turner Kirby, and including the place whereon she now lives. After the death of my said daughter I give, bequeath and devise the whole of the aforesaid lands and negroes and their future increase unto such of her children as shall be living at the time of her death and their heirs forever. But in case she should die without leaving any children living at her death, then unto the children of my son, William Kirby, then living and their heirs forever."

The plaintiffs submit cited cases as tending to support their position that the deed cannot be a purchase as to James H. Pugh and a gift as to Thomas K. Pugh. The first is *Smith v. Smith,* 46 N. C., 135. The quotation chiefly relied on is this: "So if one, in consideration of value paid to him by A., bargains and sells to A. for life, remainder to B. in fee, it will be intended that A. paid the consideration, as well on account of B., as for himself." But in such case the remainder in fee passes from the grantor at the time seizin is delivered to A. of his life estate in possession. No title is retained and there is no reversion. 2 Bl., 167. On the other hand, under the decision in *Pugh v. Allen, supra,* the deed from Francis Pugh discloses a contingency upon the happening of which a deed from James H. Pugh would have been of no effect; and as the contingency has since occurred the heirs of Thomas K. Pugh take, not under James H., but under the deed from the grantor, Francis. The principle upon which rests the decision in *Royster v. Royster,* 61 N. C., 226, is the same as that announced in *Smith v. Smith, supra.*

We have examined the remaining cases cited in the briefs and on the argument of the appellant's counsel; and if we grant their contention that James H. Pugh's release of the contingent interest referred to in the will of William Kirby is sufficient to raise a meritorious consideration as between Francis, the grantor, and James H., the grantee, we find no warrant in law for disturbing the conclusion reached by *Mr. Justice Hoke.* We therefore adhere to the decision that, upon the death of James H. Pugh without surviving issue, the heirs of Thomas K. Pugh, of the blood of the first purchaser, hold their interest, not under James H. Pugh, but under the deed from Francis, the grantor.

The judgment of the Superior Court is

Affirmed.

J. K. BARNES AND E. E. WALDEN, ADMINISTRATORS OF LEON H. CHESTNUT, DECEASED, v. PHOENIX UTILITY COMPANY AND CAROLINA POWER & LIGHT COMPANY.

(Filed 4 November, 1925.)

1. Judgments—Evidence—Nonsuit.

A judgment as of nonsuit upon the evidence on defendant's motion will not be granted if the evidence viewed in the light most favorable to the plaintiff, giving him the benefit of every reasonable inference therefrom, is sufficient to sustain a verdict in his favor.

2. Employer and Employee—Master and Servant—Negligence—Evidence—Safe Place to Work.

It is the primary and nondelegable duty of the master, in the exercise of ordinary or reasonable care, to furnish or provide for his servant a reasonably safe and suitable place in which to work in the performance of dangerous duties, within the scope of his employment.

3. Same—Electricity.

Where the defendant employer is engaged in the construction of a water-driven electrical plant, and through its vice-principal or *alter ego*, instructs the plaintiff's intestate in his own way as best he could to repair a roof of the house at the dam in which the water gates were operated by electricity, and through which, near the top, wires carrying a heavy voltage of electricity passed, and the evidence is conflicting as to whether the roof could have been safely fixed from on top or beneath where the heavily electrically charged wires were placed, and that the intestate, working from within the building, came in contact with these wires resulting in his being electrocuted by the current not having been turned off as it should have been done by the employer, in such instances: *Held*, under the facts of this case, the employee had the right to have relied upon his employer's having performed this duty, and is sufficient evidence of the employer's actionable negligence to deny defendant's motion for judgment as of nonsuit.

4. Same—Scope of Employee's Duty.

While an employer is not liable when his employee departs from his line of duty and comes in contact with live wires under its care and control, the principle does not apply when the employee is instructed to do a dangerous duty in his own way, or as best he could and is injured in a reasonable pursuance thereof, proximately caused by his employer's negligence in failing to provide a reasonably safe place for him to work.

APPEAL by Phoenix Utility Company from *Bond, J.*, and a jury, at March Term, 1925, of CHATHAM.

The plaintiffs were duly appointed and qualified as administrators of the estate of Leon H. Chestnut and sued the defendant corporations jointly.

A nonsuit was entered at the close of plaintiffs' evidence as to the Carolina Power & Light Company, no appeal was taken, and it is not necessary to consider its defenses.

Plaintiffs allege: That on 13 November, 1924, and for more than a year prior thereto, the plaintiffs' intestate was employed by the defendants as a carpenter, at Phoenix, Chatham County, North Carolina, at which place the defendants were erecting a "steam plant" to be used by the defendant, the Carolina Power & Light Company, for manufacturing or generating electricity; and that on the said 13 November, 1924, plaintiffs' said intestate, at the directions of and instructions from one of his foremen, climbed into the roof of one of the buildings some 20 feet high, and located at said plant, for the purpose of making some repair on said building, and he was directed to go out upon a small steel beam for such purpose, said beam being some 15 feet from the floor; that in the roof of said building and over the said beam, and just where the plaintiffs' intestate was required to do the work, the defendant Carolina Power & Light Company had placed several lines of wire used for the transmission of electricity; that over such lines electricity of high voltage, which is a dangerous and life-destroying force, was transmitted, and in order to protect the plaintiffs' intestate and furnish him a safe place in which to work, it was necessary for and was the duty of the defendants to cut off the said current, so that said wires should not be charged with electricity while he was in said roof engaged in making the said repairs and performing such other duties as he had been directed to perform; that while the plaintiffs' intestate was in said roof upon said steel beam, as aforesaid, endeavoring to perform the duties as directed, the defendants negligently, carelessly, wrongfully, and in utter disregard of its duty to plaintiffs' intestate, permitted a dangerous, excessive and highly charged current of electricity to pass through or over said lines, and while attempting to perform his duties incident to making some repairs, the plaintiffs' intestate unavoidably came in contact with one of the wires charged as aforesaid, and was immediately and instantaneously electrocuted, and fell to the ground, dead. That the negligence of the defendants in failing to cut off said current and their failure to furnish the plaintiffs' intestate a safe place in which to work was the proximate cause of his death. That as result of the negligence of the defendants as above alleged, the plaintiffs' intestate has been endamaged, etc.

The Phoenix Utility Company admits it is a corporation and that Leon H. Chestnut was in its employ on 13 November, 1924, but denies all the other allegations of plaintiffs' complaint. For a further defense it sets up:

(1) That it has no knowledge or information to form a belief as to what caused the death of Chestnut and denies it was caused by electrocution; that it was engaged in construction work and owned no interest in any electric wires.

(2) It sets up the plea of contributory negligence: It was not necessary for plaintiffs' intestate to have gone under the shelter or near the wires described in the complaint, and if he did so, as alleged in the complaint, and did so not of necessity or on account of any order of any foreman of this defendant, but voluntarily; that the place at which the plaintiffs' intestate was required to work, and should have worked on the top of the roof and at a distance from the said wires was perfectly safe and free from all of the dangers which are alleged in the complaint to have caused his injury and death, and that it was the duty of the plaintiffs' intestate to have remained in said place and to have finished his work there, and the plaintiffs' intestate in going under the shelter and coming in contact with the wires, as alleged in the complaint, if he did come in contact therewith, which the defendant denies, contributed by his own negligence to his injury and death, and his said contributory negligence was the proximate cause thereof; and this defendant pleads said contributory negligence in bar of the plaintiffs' recovery herein.

(3) That plaintiffs' intestate was experienced and accustomed to work in and about wires, knew the danger, knew, or ought to have known, that the wires were charged and should have had same cut off before working in close proximity. That he had served long in and about electrical wires—knew the dangers and that he negligently and carelessly took hold of the wires, if he was killed by the electric current, and this negligence on his part was the proximate cause of his death. That plaintiffs' intestate well knew that the place into which he voluntarily went without any order of his superior or foreman was a dangerous and unsafe place in which to work, and in voluntarily climbing and working in and near the wires alleged to be charged with electric current, the plaintiffs' intestate assumed the risk incident thereto, and this defendant is not chargeable therewith; and the defendant pleads said assumption of risk in bar of the plaintiffs' recovery herein.

The issues submitted to the jury and their answers thereto, were as follows:

"1. Was the plaintiffs' intestate killed by the negligence of the defendant, the Phoenix Utility Company, as alleged in the complaint? Answer: Yes.

"2. Did the plaintiffs' intestate, Chestnut, by his own negligence, contribute to the injury resulting in his death, as alleged in the answer? Answer: No.

"3. Did the plaintiffs' intestate, Chestnut, voluntarily assume the risk of receiving the injury resulting in his death, as alleged in the answer? Answer: No.

"4. What damages, if any, are the plaintiffs entitled to recover of the defendant, the Phoenix Utility Company? Answer: $6,500.00."

Judgment was rendered on the verdict. Many exceptions and assignments of error were made by defendant and appeal taken to the Supreme Court. The material ones, and relevant facts, will be considered in the opinion.

Siler & Barber and Murray Allen for plaintiffs.
Long & Bell for defendant.

CLARKSON, J. The real and material assignment of error by defendant "For that the court denied the defendants' motion for judgment as of nonsuit at the close of plaintiffs' evidence." The defendant introduced no evidence.

"On a motion to nonsuit, the evidence is to be taken in the light most favorable to plaintiff, and he is entitled to the benefit of every reasonable intendment upon the evidence, and every reasonable inference to be drawn therefrom. *Christman v. Hilliard,* 167 N. C., 6; *Oil Co. v. Hunt,* 187 N. C., 157; *Hanes v. Utilities Co.,* 188 N. C., 465; *Hancock v. Southgate,* 186 N. C., 282." *Lindsey v. Lumber Co.,* 189 N. C., 119; *Nash v. Royster,* 189 N. C., 408; *Baltimore & O. R. R. Co. v. Groeger,* U. S. Sup. Court (filed 5 January, 1925).

The facts: Leon H. Chestnut was a carpenter and had been working for about two years for defendant, Phoenix Utility Company. This company was constructing a steam plant for the Carolina Power Company, which was subsequently turned over to the Carolina Power & Light Company. The construction work was going on for several years. The intake building at the river is built of steel framework—there are no sides on the building. It is covered on the top, the sides come down two or three feet. The roof of the building is about 18 feet from the level of the floor to where the little weather-boarding comes and about 2½ or 3 feet from the roof down to the level of the weather-boarding. The trolley wires are up under the side of the weather-boarding. Three small bare copper wires, one setting over the other 4 to 6 inches apart and about 15 to 20 inches from the wall or side, ran from one end of the building to the other. The wires are used for the current to go to the motor that pulls the gates up. The gates are 16 to 18 feet long and 8 feet wide, they were steel frame with screens fitted in and are used to keep trash, etc., from coming in where the water goes to the plant, and are near where the wires are in the intake building. A person could move around safely under the intake building to clinch the nail if there was no juice—electricity—in the wires. It was not a dangerous place. Chestnut had to go up between the wires and the weather-board-

ing to get to the nail that he was going to clinch. There was about 18 or 20 inches of space between the weather-boarding and these wires. A person who walks around has the wall to hold to. The trolley wires were naked, not covered or insulated. It was the custom to put the current on the wires to give power to pull the gates up. The motor was being used the evening before the death of Chestnut, the juice or current was on the trolley wires, two gates were pulled up. The wires ran from the boiler room about 50 yards to the intake building. The current could be disconnected by two switches. The switch-house, or cut-off, was at the intake shed and boiler room. The roof to the intake shed was completed but was hit by a crane or derrick. The juice, or electricity, was turned on the evening before to lift the gates to make repairs. Nobody had been notified to cut off the current. *Chestnut fell straight under the wires.* The voltage of electricity that the wires carried was approximately 550 volts. W. L. Hipps, working for Phoenix Utility Company turned on the juice. The capacity of the plant is 30,000 kilowatts or 40,000 horsepower. Shortly after Chestnut fell the switch in the switchhouse at the intake shed was found to be coupled or connected up with the juice or electric current. With the roof torn up or wrecked by the derrick or crane, Chestnut, who was working with Riddle, was sent to repair the wreck—"to fix it the best we could," was the order of the foreman, Charles Marks, of Phoenix Utility Company.

T. N. Riddle, said "Mr. Chestnut and I were repairing the roof that day. We went up there to repair the roof; *'to fix it the best we could,'* because we were told to by Charles Marks, our foreman. He was the foreman of Mr. Chestnut and me. The roof was wrecked by the crane and we were sort of straightening it back. It is a tin roof, sheet tin. We could have fixed it from the top if we had had sufficient bolts, but we didn't have them. Mr. Marks fixed us a piece of steel in order to hold the tin together while we were bolting it. We were bolting it to hold it together in shape. We didn't finish it; we got out of bolts and Mr. Chestnut said it would be all right if we clinched it with a nail anyhow, he thought; and I said all right, I thought it would too. Mr. Chestnut did not clinch the nail, but he went to clinch it. We had a ladder to go up there, and he went down the ladder and under that little—I don't know what you call it—anyhow, the sheet down about 2 or 3 feet, dropped down below that, under it, under there. I don't know how high he got up, but he got far enough to ask me where about the nail was. He was going under the roof to pin it down, I guess, so it would hold this covering together, to clinch the nail. He was clinching the nail to hold the roof down. After Mr. Chestnut got under there he asked me where the nail was, and I shook the tin roof so he would know where; I asked him if he saw that, and he never answered it.

The next time I saw him he was down on the room floor. He was killed. I did not know at that time whether there was any exposed live wires under the roof where Mr. Chestnut went or not. I have found out since that there are three wires under the roof which are used in raising the gates at the intake."

Dr. J. E. Cathell, and others, testified to scars on Chestnut's left hand shortly after the injury, and Chestnut's wife testified that he had no scar on his left hand—(prior)—a reasonable inference he was burned by the live wires.

It is the duty of the master, in the exercise of ordinary or reasonable care, to furnish or provide his servant a reasonably safe and suitable place in which to work. This duty is primary and nondelegable. *Cable v. Lumber Co.,* 189 N. C., p. 840; *Riggs v. Mfg. Co., ante,* 256; *Paderick v. Lumber Co., ante,* 308.

In the case here, it is contended by the defendant, Phoenix Utility Company, that this was done and the plaintiffs' intestate went beyond the safety zone and was killed. If he had not gone under the roof of the intake building, he would not have come in contact with the live wires. That the roof was safe, that he dropped the tap and should have gone after it. That he had a safe and suitable place in which to do his work and he left the safe place where he was assigned to work.

On the other hand, it is contended by the plaintiffs that the master, through his *alter ego,* the foreman, Charles Marks, in sending Chestnut and his fellow workman to repair the roof, gave him bolts and taps, but went further and committed to him the discretion "to fix it the best we could," and the safety zone included the place where the live wires were, with no notice to Chestnut that the juice or current was on. That the crane or derrick had ripped the tin up and in fixing it back, that when the bolts were all put in and the last could not be tightened, as the tap had dropped, it was only necessary to hold down a part of the tin, the balance had been fixed, and a large nail in the tin was ample to do this and it was nailed through, but to hold it tight it was necessary to clinch the nail and Chestnut had to go under the shed to do this and was electrocuted. That under all the facts and circumstances, Chestnut acted in the scope of the authority given him by the foreman. The utility company did not have the trolley wires covered or insulated, and the voltage of electricity or juice in the electric wires was deadly; and the utility company did not, in the exercise of reasonable care, provide Chestnut with a safe and suitable place or zone to do his work, and the failure was the proximate cause of Chestnut being killed.

It is well settled that where a servant departs from the sphere of his assigned duty, the relation of master and servant is temporarily sus-

pended. The act must be performed in the line of duty and within the scope of the authority conferred by the master, either express, implied or apparent. *Mason v. R. R.,* 114 N. C., 718; *Rittenhouse v. R. R.,* 120 N. C., 547; *Whitson v. Wrenn,* 134 N. C., 86; *Patterson v. Lumber Co.,* 145 N. C., 42; *Burnett v. Mills Co.,* 152 N. C., 35; *Horne v. R. R.,* 170 N. C., 659; *Horton v. R. R.,* 175 N. C., 487.

We think the principle above enunciated and contended for by defendant, as to the liability of master and servant, correct. But we think here that the defendant's contention is too restricted from the *alter ego* authority to plaintiffs' intestate "to fix it the best we could." The tin roof ripped up by the crane or derrick had to be fastened down, bolts were used, a tap of one was dropped by Chestnut—a nail would answer already nailed through but had to be clinched. The faithful servant, to perform the duty of fastening down the tin, which he was sent to do, went under the roof to clinch the nail, came in contact with live wires unprotected and naked, and was electrocuted. Defendant called the place, in its further answer, a "shelter"—it proved to be a death-trap.

4 Labatt's Master and Servant (2d ed.), part sec. 1565, p. 4721 says: "If an employee quits the work assigned to him by his employer, and voluntarily undertakes to do work about which he had no duties to perform by virtue of the contractual relation existing between him and his employer, then, while such condition exists, the duty growing out of that relation of using care for his safety does not rest upon the employer. In other words, a servant who voluntarily and without directions from the master, and without his acquiescence, goes into hazardous work which is not embraced in the contract of hiring, may be regarded as putting himself beyond the protection of his master's implied undertaking." . . . Part sec. 1566, says: "The scope of a servant's duties in relation to the rule illustrated by the cases cited in the last section is defined by what he was employed to perform, and by what, with the knowledge and approval of his employer, he actually did perform, rather than by the mere verbal designation of his position. The question whether the injured person was acting in the course of his employment is for the jury, where the evidence is conflicting, or where a difference of opinion may reasonably be entertained with regard to the proper inference to be drawn from the testimony. Otherwise that question is decided as one of law by the court."

In 8 Thompson's Commentaries on the Law of Negligence (White's Supplement), sec. 5335, it is stated: "The servant has the right to assume that his master has performed his duties, and he may rely on the performance of the duty not to create a dangerous condition without warning. The employee likewise has the right to assume that his employer will conduct his business with reasonable regard to rules

laid down by such employer. The servant without knowledge of a defect in appliances furnished by the master may act on the assumption that these appliances are reasonably safe. Similarly he may rely on the performance of the duty of his master to make the place of work reasonably safe, and he is not required to make an examination to ascertain whether his duty has been performed. The employee may, ordinarily, rely on the assurance of safety given him by his supervisors, but this does not relieve him from the duty to exercise care to avoid known and obvious dangers. The servant may, ordinarily assume that the employers will properly discharge their duty." *Thomas v. Lawrence,* 189 N. C., 521; *Walker v. R. R.,* 135 N. C., 738.

Without pursuing the subject further and without considering the assignments of error *seriatim,* from the view we take of the case, we think the court below was correct in refusing defendants' motion for judgment as of nonsuit, and in refusing the prayers for instruction as asked for. In the instructions of the court below on the issues, we can discover no prejudicial or reversible error.

No error.

JOSEPH L. CONRAD v. THE BOARD OF EDUCATION OF GRANVILLE COUNTY.

(Filed 4 November, 1925.)

1. Pleadings—Demurrer.

A complaint will be sustained as against a demurrer when its allegations, liberally construed, C. S., 535, are sufficient in law to sustain the plaintiff's cause of action.

2. Same—Education—Municipal Corporations—Schools—Electric Lights—Contracts.

Where in his complaint against a county board of education the plaintiff alleges a contract for equipping a high school for electric lights and connecting it with a plant of another town to furnish electricity, its completion and use in the buildings for this purpose and the amount of the contract price due and unpaid, a demurrer thereto is bad.

3. Same—Statutes.

The provisions of C. S., vol. III, sec. 5468, do not require that the plans for lighting and furnishing electricity for a public school building shall be approved by the State Superintendent of Public Instruction, and a demurrer to a complaint in an action by the contractor to recover of the county board of education for the amount of a completed contract for failure to so allege, is bad.

4. Schools—Education—Electric Lighting—Demurrer.

The proper lighting of a public school building is one of the needs for the efficiency of the proper use thereof, and where funds had been provided for the purpose, a contract made in the discretion of the county board of education to supply them, may be enforced.

5. Same—Right of Ways—Title—Statutes.

Where in the exercise of a sound discretion the board of education of a county acting in pursuance of the statute, has contracted to supply with electric lights a public school building then existing, the contract will not be declared invalid because it does not appear, on demurrer, that the title to the right of ways of the pole and wire lines have not been acquired. C. S., 5472.

6. Same—Municipal Corporations—Education—General Power—Statutes.

Under the general statutory authority of Art. 5, ch. 95, vol. III, of the Consolidated Statutes, the erection of electric transmission lines to supply public school buildings with electric lighting is given to the board of education of a county. C. S., 5467, 5478. (Vol. III.)

7. Same—Statute of Frauds—Contracts.

The construction and installing of an electric light system for a public school building does not come within the requirements of C. S., 5468, that a contract therefor must be in writing.

8. Same—Parties—Assignment of Contracts—Actions—Defense.

The assignee for a consideration of a contract for the installation of wires, the building of an electric transmission line, etc., for lighting a public schoolhouse, is the proper party in interest to maintain an action thereon against the county board of education, without prejudice, however, to any defense against the contractor who has assigned the contract.

APPEAL by defendant from *Grady, J.*, of Tenth Judicial District, at Chambers, 16 September, 1925. Affirmed.

In his complaint, plaintiff alleges that defendant, the Board of Education of Granville County, duly presented to the board of commissioners of said county, its budget showing the needs of the schools of said county for the year 1924, and that said board of commissioners duly approved same, and provided funds required to meet said needs, as provided by statute.

He further alleges in said complaint:

"4. That one of the school buildings of Granville County, to wit: The Wilton High School is located at Wilton, N. C., in said county of Granville, which building was erected during the year 1924, and being a new building, it became the duty of the Board of Education of Granville County to provide for a proper lighting of the same, which provision was made at the time hereinafter set out.

"5. That on 8 August, 1924, at a meeting of the Board of Education of Granville County, in Oxford, a proposal was made by N. J. Boddie,

then of Granville County, North Carolina, to build a transmission line between Creedmoor and Wilton, over which electric current could be transmitted to and for the said Wilton High School, which proposal, as appears upon the minutes of said board was and is as follows:

PROPOSAL:

"I propose to erect for the sum of $3,250.00 a transmission line from Creedmoor, connecting the plant of G. H. Dove and the Wilton High School, and to install a five K. W. transformer at the school building. I propose to use No. 8 wire, metal cross-arms, or brackets, suitable poles, set not more than 140 feet apart. Suitable provisions to be made for lightning arrestors and grounds. The entire installation to be made to comply with the State law, and with due regards for the public safety.

"Witness my hand and seal this 8 August, 1924.

"(Signed) N. J. BODDIE, (Seal).

"D. H. LYON, witness."

Upon motion of Dr. Rogers, seconded by Mr. Cheatham, both of whom were duly qualified members of said board, the said proposal of N. J. Boddie was accepted, one member of said board, to wit: Mr. Hart, voting against the same, and each and every other member of said board voting for and in favor of the acceptance of said proposal.

That appended to the proposal of the said N. J. Boddie was the following:

"I, G. H. Dove, hereby propose to furnish power over this line to the Wilton High School, and maintain the line. The power to cost the county board of education nothing until an amount of power has been furnished equal to the cost of the line, at which time the line will pass to my title."

"7. That in pursuance of said contract, the said N. J. Boddie, and this plaintiff, Joseph L. Conrad, with whom the said N. J. Boddie contracted for the purpose of assisting him in the performance of said contract, proceeded to construct and erect said transmission line from Creedmoor to said Wilton High School, in full compliance with the terms of said proposal, connecting same with a power plant belonging to G. H. Dove, at Creedmoor, N. C., where electrical current and power was generated, and over said transmission line electrical current or power was in fact transmitted to said school, which was lighted by the same during a portion of the past school term.

"8. That the construction and erection of said transmission line was completed on or about 7 December, 1924; that no part of said contract

price of $3,250 has been paid, although repeated requests have been made upon the defendant for payment of same, and the whole of said amount remains due and unpaid, together with interest on the same from 7 December, 1924, until paid."

Plaintiff further alleges that after the acceptance by defendant of his proposal as alleged in the complaint, and after full performance of same by N. J. Boddie, the said N. J. Boddie transferred and assigned in writing all his rights and interests in the contract between him and defendant to plaintiff, and that by reason of said transfer and assignment, defendant is now indebted to plaintiff in the sum of $3,250 and interest on same from 7 December, 1924, until paid.

Defendant demurred to said complaint upon the following grounds, as set out and specified in writing:

"1. That if the alleged contract set out in the complaint had been executed as alleged in the complaint, the same would have in effect been an agreement on the part of the board of education to lend the sum of $3,250 to N. J. Boddie for the benefit of G. H. Dove for an indefinite period of time, without any assurance that the same would ever be repaid, and said contract would have been beyond the powers conferred upon the board of education by law, and the said N. J. Boddie and the plaintiff knew, or ought to have known, that the board of education was without any authority, either express or implied, to enter into such contract.

"2. That it is nowhere set forth in said complaint that the plans for the construction of the transmission line mentioned in the complaint had been prepared and submitted to the State Architect and approved by him as required by law, and until said plans had been approved by said State Architect, the board of education was without authority to make any contract with the plaintiff or any other person for the erection of a transmission line of the character set forth in the complaint.

"3. That if the alleged contract set out in the complaint had been executed, the board of education was without authority to contract for the erection of a power line of the length mentioned in said complaint, to wit, from Creedmoor to Wilton.

"4. That the complaint nowhere sets forth that the plaintiff or N. J. Boddie, or G. H. Dove, or anyone in their behalf, prior to the erection of said transmission line, or prior to demanding payment for same, or at any time thereafter, had procured and delivered to the said board of education deeds for the right of way over which said transmission line was constructed, and that until said deeds were procured, delivered and registered, the construction of said transmission line by or for the board of education would have been illegal, and no recovery could be had against the board of education for the construction of the same.

"5. That the contract attempted to be made and alleged in the complaint to have been made is *ultra vires,* for that artificial lighting of a public school building is not necessary to meet the constitutional requirement to give to every child in North Carolina between the ages of six and twenty-one years as much as a six-months public school term in each year."

From judgment overruling the demurrer, defendant appealed to the Supreme Court.

Hicks & Stem for plaintiff.

A. W. Graham & Son and Royster & Royster for defendant.

CONNOR, J. This action, pending in the Superior Court of Granville County, was heard, upon demurrer, by the judge of the Superior Court holding the courts of the Tenth Judicial District, which includes Granville County. It is in this Court upon appeal from the judgment overruling said demurrer. C. S., vol 3, secs. 513, 514. *Justice Walker* in *Wood v. Kincaid,* 144 N. C., 393, says: "A demurrer is an objection that the pleading against which it is directed is insufficient in law to support the action or defense, and that the demurrant should not, therefore, be required to plead further. It is not its office to set forth facts, but it must stand or fall by the facts as alleged in the opposing pleading and it can raise only questions of law as to their sufficiency." A demurrer is the formal mode of disputing the sufficiency in law of the pleading to which it pertains. *Manning v. R. R.,* 188 N. C., 648. In the construction of a pleading for the purpose of determining its effect, its allegations should be liberally construed with a view to substantial justice between the parties. C. S., 535. A complaint will be sustained as against a demurrer if any part presents facts sufficient to constitute a cause of action, or if facts sufficient for that purpose can be gathered from it under a liberal construction of its terms. *Pridgen v. Pridgen, ante,* 102; *Foy v. Foy,* 188 N. C., 519; *Sexton v. Farrington,* 185 N. C., 339; *Hartsfield v. Bryan,* 177 N. C., 168.

The complaint in this action states facts sufficient to constitute a cause of action, in favor of plaintiff and against defendant, unless, upon the facts stated therein, it appears affirmatively that defendant was without authority to enter into the contract alleged or that defendant is not liable to plaintiff upon said contract.

Defendant, by its demurrer, in writing, contends that it was without such authority (1) because of the terms and provisions of the contract as alleged in the complaint and (2) because it is not alleged therein that defendant had complied with certain statutes applicable to it as the Board of Education of Granville County, before entering into such

contract. Defendant by its demurrer *ore tenus,* contends, further, that the complaint does not state facts sufficient to constitute a cause of action for that (1) it is nowhere stated therein that the alleged contract was in writing; (2) that even if it is liable on the contract alleged, plaintiff cannot maintain this action because he is not a party thereto but is only the assignee and transferee of N. J. Boddie, with whom the contract was made.

1. The proposal dated 8 August, 1924, signed by N. J. Boddie and accepted by defendant, as appears on the minutes of its meeting on said day, constitutes the contract upon which plaintiff seeks to recover in this action. By this contract N. J. Boddie agreed to erect a transmission line from Creedmoor connecting the plant of G. H. Dove with the Wilton High School building; defendant agreed to pay to N. J. Boddie for the erection of this transmission line the sum of $3,250. The words appearing in said minutes and alleged to be appended to the proposal of N. J. Boddie, purporting to be a proposal by G. H. Dove to furnish power over this line and to maintain it upon the terms stated therein, do not constitute any part of the contract between N. J. Boddie and defendant. It does not appear from the complaint that G. H. Dove signed the purported proposal or that defendant accepted it. No contract is alleged to have been made between defendant and G. H. Dove. Whether or not, if the purported proposal of G. H. Dove had constituted a part of the contract between N. J. Boddie and defendant, the contract would have been in effect an agreement by the board of education to lend the sum of $3,250 to N. J. Boddie for the benefit of G. H. Dove, for an indefinite period of time, without any assurance that same would ever be repaid, and that, therefore the contract would have been beyond the powers conferred upon the defendant as the Board of Education of Granville County, is not presented for consideration. The contract as alleged in the complaint does not involve the loan of money by defendant; nor does defendant thereby obligate itself to sell the transmission line when same had been constructed. There is nothing inherent in the contract as alleged in the complaint that renders it void or unenforceable and we must therefore overrule the demurrer upon the first ground relied upon by defendant.

2. Defendant further demurs to the complaint for that it is not alleged therein and it does not appear therefrom (a) that the plans for said transmission line had been submitted to and approved by the State Architect or (b) that deeds had been procured, delivered and registered conveying to defendant the right of way over which said transmission line had been constructed.

(a) There is no statute in this State requiring that plans for new schoolhouses or for repairs to or equipment for old schoolhouses shall

be submitted to or approved by the State Architect. C. S., 7492, when in force, applied only to buildings to be erected or which had been erected at State institutions; it did not apply to school buildings over which the county board of education had jurisdiction. This statute however, has been repealed. Public Laws 1921, chap. 213.

C. S., vol. III, sec. 5468 provides that the county board of education shall not be authorized to invest any money in any schoolhouse that is not built in accordance with plans approved by the State Superintendent of Public Instruction. The contract set out in the complaint herein is not for the building of a new schoolhouse. It is a contract made in August, 1924, to provide for the lighting of a schoolhouse erected during that year. It was the duty of the defendant to provide for the proper lighting of said schoolhouse; it had authority commensurate with the performance of this duty. The lighting of this schoolhouse was one of the needs of the public schools of Granville County for which the board of commissioners of said county had provided funds upon its approval of the budget of May, 1924. C. S., vol. III, sec. 5601. The statute does not require the approval by the State Superintendent of Public Instruction of a contract made by the county board of education providing for the lighting of a public school building.

(b) C. S., vol. III, sec. 5472 is as follows: "The county board of education shall make no contract for the erection or repair of any school building unless the site on which it is located is owned by the county board of education and the deed for the same is properly registered and deposited with the clerk of the court." This statute, the wisdom of which is manifest, cannot be construed as applying to the erection of electric light wires, erected by the board of education to provide for the lighting of a schoolhouse nor to the right of way required for said wires. It applies only to sites for school buildings; it does not extend to or include right of ways. Prudence and good judgment, manifestly, should suggest to a county board of education the advisability of securing satisfactory title to such right of way, but it cannot be held that a failure to procure deeds for such right of way is a violation of the statute or that one who has constructed a transmission line over a right of way cannot recover the contract price without alleging and proving a compliance by the board of education with this statute.

3. Defendant further contends by its demurrer that no cause of action is set out in the complaint for that it is not alleged therein and it does not appear therefrom (a) that defendant had authority to contract for the erection of a transmission line of the length of the line mentioned in the complaint, to wit, from Creedmoor to Wilton, or (b) that defendant has authority to provide by contract for the artificial lighting of a school building.

(a) The general powers of a county board of education will be found in C. S., Art. 5, ch. 95, vol. III. It is there provided that the county board of education shall have general control and supervision of all matters pertaining to the public schools in their respective counties. It is made the duty of the said board of education to provide an adequate school system for the benefit of all the children of the county as directed by law. All powers and duties conferred and imposed by law respecting public schools which are not expressly conferred and imposed upon some other officials are conferred and imposed upon the county board of education.

The distance between Creedmoor and Wilton is not stated in the complaint. This, however, cannot affect the power of the board of education to contract for the erection of a transmission line which in the exercise of its discretion and in good faith it deems necessary or proper for providing lights for the Wilton High School.

(b) It is expressly provided by law that school buildings properly lighted and equipped with suitable desks for the children, and tables and chairs for teachers, are necessary for the maintenance of the six months school term as required by the Constitution. C. S., vol. III, sec. 5467. It is also made the duty of the county board of education to encourage the use of school buildings for civic or community meetings of all kinds that may be beneficial for the patrons of the community. C. S., vol. III, sec. 5478. A construction of the statute conferring power upon the board of education with respect to the lighting of a public school building, and certainly of a high school building, which would limit such power to the providing of light during the day through windows is not required by the letter of the statutes and certainly not by the spirit. The manner in which, and the means by which a public school building shall be lighted, to the end that the people of the community in which it is located may use and enjoy it, are properly to be determined by the board of education, in the exercise of their discretion, and of course, in good faith.

The demurrer upon the grounds set out in writing was properly overruled. The judgment with respect to these grounds of demurrer must be affirmed.

4. In addition to the ground of demurrer, as set out in writing, defendant demurred, *ore tenus,* in this Court, as hereinbefore stated.

(a) C. S., vol. III, sec. 5468, requires that all contracts for buildings erected by the board of education of a county shall be in writing. This manifestly does not apply to contracts for installing apparatus for lighting a school building. There is no statute requiring that the contract upon which this action is brought shall be in writing. However, it appears from the complaint that the proposal was in writing, signed

by N. J. Boddie, and that it, together with the acceptance by defendant, was entered upon the minutes of the very meeting at which the contract was made.

(b) This action is prosecuted by the real party in interest, as appears from the allegations of the complaint. The cause of action arose out of contract. N. J. Boddie, the original party to the contract, having fully performed his agreement with defendant, has transferred and assigned all his right, title and interest in the contract price to plaintiff and now has no interest therein. Plaintiff may therefore prosecute the action to recover the contract price, without prejudice, however, to any defense which defendant has as against N. J. Boddie. C. S., 446. *Guy v. Bullard,* 178 N. C., 228; *Petty v. Rousseau,* 94 N. C., 356.

The demurrer, *ore tenus* cannot be sustained. This Court does not consider or pass upon the wisdom of the contract, which it appears from the complaint defendant made for lighting the Wilton High School building. It holds that as a matter of law, a cause of action is set out in the complaint, in favor of plaintiff and against defendant. This is the sole question presented by the demurrer.

It is alleged in the complaint that the contract was fully performed by N. J. Boddie, plaintiff's assignor, and that defendant has accepted and used the transmission line for the purpose of lighting the Wilton High School building. The school funds should be protected and not expended for purposes not authorized by law. However, the board of education in good faith having entered into the contract which has been fully performed by the other party thereto who now seeks payment for his labor and material, ought not to be relieved of liability by a strained or narrow construction of statutes enacted for the purpose of regulating the manner in which the public business committed to it shall be done.

The judgment overruling the demurrer must be

Affirmed.

FURST & THOMAS v. A. D. MERRITT ET AL.

(Filed 4 November, 1925.)

1. Constitutional Law—Equity—Courts.

Article IV, sec. 1, of our Constitution (1868), abolishing "the forms" of suits in equity, does not imply that the distinctions between law and equity are abolished, and the effect is to make them cognizable and triable in the same court.

2. Same—Fraud in the Factum.

Where a contract is avoided by fraud in the *factum*, it is void *ab initio* and no rights therein are acquired by the parties thereto.

3. Same—Fraud in the Treaty.

As affects innocent third persons, a contract that is fraudulent in the treaty is voidable in the equitable jurisdiction of the court as distinguished from one fraudulent in the *factum*, formerly cognizable only in a court of law.

4. Same—Actions—Suits.

Where fraud in the factum and fraud in the treaty in defense to an action upon contract are involved in the action, one relates to the execution of the contract and the other to the meeting of the minds into an agreement upon the subject-matter.

5. Same—Issues—Appeal and Error.

In an action upon contract where fraud in the *factum* and fraud in the treaty as affecting the rights of innocent third persons are both relied upon for defense, it is reversible error for the trial court to submit to the jury, the issue as to whether the instrument was procured by fraud and false representations, without observing the distinctions between the legal and equitable principles involved.

APPEAL by plaintiffs from *Calvert, J.*, at May Term, 1925, of ORANGE.

Civil action to recover of A. D. Merritt, principal, and E. S. Merritt and J. A. Fowler, sureties, the sum of $604.87 due by contract duly executed by A. D. Merritt and E. S. Merritt, but which J. A. Fowler alleges (1) that he never signed or authorized anyone to sign for him, as he only agreed to sign a recommendation; and (2) that, if his name appear as surety on the instrument in question, the authorization of his signature was procured by false and fraudulent representations.

Upon the issues thus raised by the answer and pleas of J. A. Fowler, the jury returned the following verdict:

"1. Was the signature of J. A. Fowler to said guaranty procured by fraud and false representation, as alleged in the answer? Answer: Yes.

"2. Is the defendant J. A. Fowler indebted to the plaintiffs, Furst and Thomas, and if so, in what amount? Answer: Nothing."

Judgment on the verdict releasing the defendant, J. A. Fowler, from liability under the contract, from which the plaintiffs appeal, assigning errors.

Gattis & Gattis for plaintiffs.

Roberson & Whitfield and W. J. Brogden for defendants.

STACY, C. J. The plaintiffs are engaged in business at Freeport, Ill. They authorized A. D. Merritt by contract to act as their "salesman," or exchange agent for their goods and products in Durham County; but before the final execution and acceptance of said agreement, plain-

tiffs required the said A. D. Merritt to furnish two sureties who would guarantee the faithful performance of the contract on his part. E. S. Merritt signed as one of the sureties.

There is a sharp conflict in the evidence as to the representations and circumstances under which J. A. Fowler's name was affixed to said instrument.

Touching the authorization of his signature, the defendant, J. A. Fowler, testified as follows:

"About five years ago I met J. Y. Merritt and his son, A. D. Merritt, in a buggy in a road near my home. They stopped and J. Y. Merritt asked me to sign a recommendation for his son so that he could work for some firm. I asked him if that was all it was, he said that was all it was, and that there would never be any hereafter to it. I said, if that is all it is, you can put my name down. I cannot read, and I relied on the statement of J. Y. Merritt that the paper was only a recommendation. J. Y. Merritt did all the talking and A. D. Merritt remained in the buggy beside him. I never knew the paper was a guaranty until I received a letter from plaintiffs terminating contract."

J. Y. Merritt testified for plaintiffs as follows:

"My son said he would have to get two sureties to sign the contract before he could go to work. He said he thought he would get Mr. Fowler and E. S. Merritt. We got in the buggy and started out to see them and met Mr. Fowler in the road. I told him that my son had a job and needed two sureties to sign the contract before he could go to work. I told him all about it. He said to go ahead and put his name down. I did all the talking. We did not have a pen so I waited until I got to Carrboro and then signed J. A. Fowler's name to the contract. I told Fowler that I thought there would be no hereafter."

Cross-examination: "I did not tell him it was a recommendation. . . . I told him it was a recommendation. . . . My son offered to read the contract to Fowler and he said it was not necessary. I do not know whether my son took the contract out of his pocket or not. He had it in his pocket. I told Fowler what the contract was, that it was a security."

A. D. Merritt, for the plaintiffs, testified as follows:

"We met Mr. Fowler in the road and my father did all the talking. I took the contract out of my pocket and offered to read it. He said it was no use, he could not read, and to go ahead and put his name down. My father told Fowler that there would be no hereafter to it. I do not think Fowler would have signed the contract if he had been told that it was an unlimited obligation to stand for my debts. I was to be exchange agent to sell the goods of plaintiffs' in Durham County. The contract was sent to me to be signed by myself and two guarantors."

It will be observed that the defendant, J. A. Fowler, pleads fraud in the *factum* as well as fraud in the treaty, in connection with the contract and agreement sought to be avoided. The difference between these two pleas becomes important in the instant case because of the presence and position of the plaintiffs, who contend that they are innocent third parties and in no way connected with the alleged fraud.

This difference has been obscured, to some extent at least, since the abolition in this jurisdiction of the distinctions between actions at law and suits in equity, but it should be remembered the abolition of the "forms of all such actions and suits" by the Constitution of 1868, Article IV, sec. 1, does not imply that the distinctions between law and equity have been abolished in North Carolina. The principles of law and the doctrines of equity remain the same and are practically unaffected by this constitutional provision, the only change wrought being in the method of administering them, and in some degree the extent of their application. *Waters v. Garris,* 188 N. C., p. 310, and cases there cited.

Prior to the adoption of the Constitution of 1868, the execution of an instrument brought about by fraud in the *factum* could be avoided in an action at law, because void, while a deed or contract induced by fraud in the treaty, either in the consideration of it, or in the false representation of some matter or thing collateral to it, could be relieved against only by a suit in equity, because only voidable. *McArthur v. Johnson,* 61 N. C., 317; *Gwynn v. Hodge,* 49 N. C., 168; *Canoy v. Troutman,* 29 N. C., 155; *Reed v. Moore,* 25 N. C., 310; *Logan v. Simmons,* 18 N. C., 13.

It was said by *Pearson, J.,* in *Devereaux v. Burgwin,* 33 N. C., p. 493, that, "under the plea of *non est factum,* if the execution of the deed is proven, it cannot be avoided in a court of law by proof that it was *procured to be* executed by means of falsehood and misrepresentation or other fraud. There must be fraud *in the factum;* as by substituting one paper instead of the one intended to be executed, so as to show that the party did not intend to execute the paper he was thus made to sign, seal and deliver as his deed."

In a court of law, the question was a naked one of deed or no deed—*factum* or *non est factum. Gant v. Hunsucker,* 34 N. C., 254.

Speaking of the distinction between the two kinds of fraud, in *Cutler v. R. R.,* 128 N. C., p. 480, *Furches, C. J.,* said: "Frauds affecting the validity of deeds are of two kinds—fraud in the *factum,* and fraud in the treaty. This distinction, though not as material now as formerly, is still material in some cases. *Medlin v. Buford,* 115 N. C., 260. Besides the importance of the distinction pointed out in *Medlin v. Buford,* it was important before the junction of legal and equitable jurisdiction

in the same court, to determine the jurisdiction, as courts of law had jurisdiction of frauds in the *factum*, but not of frauds in the treaty which were cognizable alone in courts of equity. This made it important to determine, before commencing the action, whether it was fraud in the *factum* or fraud in the treaty, as the proper court in which to bring the action depended on this distinction. And while the distinction is important, it is not of that importance that it formerly was, as one is sure now to get into the right court, if there is fraud whether in the *factum* or in the treaty."

While this distinction between void and voidable deeds is no longer important for the purpose of determining the jurisdiction of the court which shall hear the case, it is still highly important in its consequences to innocent third persons, "because nothing can be founded upon a deed that is absolutely void, whereas from those which are only voidable, fair titles may flow." *Somers v. Brewer,* 2 Pick, 191. Then, too, in certain instances, even in actions between the original parties and where the rights of innocent third persons are not involved, the rules of evidence may require an observation of the difference, depending on the relief sought, whether, for instance, the action be for reformation or cancellation. *Montgomery v. Lewis,* 187 N. C., 577; *Speas v. Bank,* 188 N. C., p. 528. And in some cases, the measure of damages may be different. *Griffin v. Lumber Co.,* 140 N. C., p. 519.

As a general rule, it may be said that fraud in the *factum* arises from a want of identity or disparity between the instrument executed and the one intended to be executed, or from circumstances which go to the question as to whether the instrument, in fact, ever had any legal existence, as, for example, where a grantor intends to execute a certain deed, and another is surreptitiously substituted in the place of it (*Nichols v. Holmes,* 46 N. C., 360), or where a blind or illiterate person executes a deed when it has been read falsely to him on his request to have it read (2 Blk. Com., 304; *Manser's Case,* 2 Coke's Rep., 3), or where some trick, artifice or imposition, other than false representation as to the meaning and content of the instrument itself, is practiced on the maker in effecting the execution of the instrument. *McArthur v. Johnson,* 61 N. C., 317; *Taylor v. Edmunds,* 176 N. C., 325; *Machine Co. v. McKay,* 161 N. C., 584; *Machine Co. v. Bullock,* 161 N. C., 1; *Garrison v. Machine Co.,* 159 N. C., 285; *Unitype Co. v. Ashcraft,* 155 N. C., 63; *Briggs v. Ins. Co.,* 155 N. C., 73; *Machine Co. v. Feezer,* 152 N. C., 516; *Bank v. Chase,* 151 N. C., 108; *Tyson v. Jones,* 150 N. C., 181; *Whitehurst v. Ins. Co.,* 149 N. C., 273; *Basnight v. Jobbing Co.,* 148 N. C., 350; *Hayes v. R. R.,* 143 N. C., p. 129; *Caldwell v. Ins. Co.,* 140 N. C., 100; *Dorsett v. Mfg. Co.,* 131 N. C., p. 259-260; *Printing Co. v. McAden,* 131 N. C., 178; *Cutler v. R. R.,* 128 N. C., 480; *Peebles*

v. Guano Co., 77 N. C., 233. In all such cases, the instrument executed is different from what was intended, so that it cannot be said to be the deed of the maker at all. No title passes under such an instrument—it is void—and no rights may be acquired thereunder even by innocent third parties, such as the plaintiffs in the present action.

If fraud in the *factum* be established, "it would be immaterial whether the plaintiff is an innocent party, since, the deed being a nullity, no rights could be asserted under it in favor of any person whomsoever"—*Shepherd, C. J.*, in *Medlin v. Buford*, 115 N. C., p. 269.

But where one executes the very instrument intended to be executed, though induced to do so by some fraud in the treaty, or some fraudulent representation or pretense, as, for example, where a person who can read the instrument, neglects to do so because of some false representation, and executes it under a misapprehension as to its contents, such person is bound by the instrument at law, though a court of equity, on sufficient showing and in proper instances, may relieve against it. *Medlin v. Buford*, 115 N. C., 260; *Dixon v. Trust Co., ibid.*, 274; *Currie v. Malloy*, 185 N. C., pp. 214-215; *Lanier v. Lumber Co.*, 177 N. C., 200; *Harvester Co. v. Carter*, 173 N. C., 229; *Leonard v. Power Co.*, 155 N. C., 10; *Dellinger v. Gillespie*, 118 N. C., 737; *School Com. v. Kesler*, 67 N. C., 448. In Sheppard's Touchstone the rule applicable is stated as follows: "If the party that is to seal the deed can read himself, and doth not, or, being an illiterate or a blind man, doth not require to hear the deed read or the contents thereof declared, in these cases, albeit the deed be contrary to his mind, yet it is good and unavoidable at law; but equity may correct mistakes, frauds," etc. See 1 Shep. Touch., 56 (30 Law Lib., 121).

In this connection, however, it should be observed that the duty to read an instrument or to have it read before signing it, is a positive one, and the failure to do so, in the absence of any mistake, fraud or oppression, is a circumstance against which no relief may be had, either at law or in equity. *Grace v. Strickland*, 188 N. C., p. 373; *Colt v. Kimball, ante*, p. 172, and cases there cited. There are none so blind as those who have eyes and will not see; none so deaf as those who have ears and will not hear. *Pittman v. Tob. Growers Asso.*, 187 N. C., 340; *Clements v. Ins. Co.*, 155 N. C., 57.

> "Who is so deafe or so blinde as is hee
> That wilfully will neither heare nor see?"—*John Heywood.*

This principle lies at the very foundation of all commercial dealings, and the integrity of contracts demands that it be rigidly enforced by the courts. *Potato Co. v. Jenette*, 172 N. C., 3.

But in an action between the original parties, if it be made to appear that one induced the other to execute a paper upon his representation as to its contents, and the representation turns out to be untrue and fraudulently made, the party who relied upon it, to his injury, if he acted with reasonable prudence in the matter, is not bound to him who deceived him into executing the paper. *Baldwin v. Tel. Co.*, 59 S. E. (S. C.), 67; *May v. Loomis*, 140 N. C., 350.

Speaking to this question in *Linington v. Strong*, 107 Ill., p. 302, *Dickey, J.*, delivering the opinion of the Court, said:

"The doctrine is well settled, that, as a rule, a party guilty of fraudulent conduct shall not be allowed to cry 'negligence,' as against his own deliberate fraud. Even where parties are dealing at arms' length, if one of them makes to the other a positive statement, upon which the other acts (with the knowledge of the party making such statement) in confidence of its truth, and such statement is *known to be false* by the party making it, such conduct is fraudulent, and from it the party guilty of fraud can take no benefit. While the law does require of all parties the exercise of reasonable prudence in the business of life, and does not permit one to rest indifferent in reliance upon the interested representations of an adverse party, still, as before suggested, there is a certain limitation to this rule, and, as between the original parties to the transaction, we consider that where it appears that one party has been guilty of an intentional and deliberate fraud, by which, to his knowledge, the other party has been misled, or influenced in his action, he cannot escape the legal consequences of his fraudulent conduct by saying that the fraud might have been discovered had the party whom he deceived exercised reasonable diligence and care."

And in *Walsh v. Hall*, 66 N. C., 233, *Dick, J.*, speaking to the same question, said:

"The law does not require a prudent man to deal with everyone as a rascal and demand covenants to guard against the falsehood of every representation which may be made as to facts which constitute material inducements to a contract. There must be a reasonable reliance upon the integrity of men or the transactions of business, trade and commerce could not be conducted with that facility and confidence which are essential to successful enterprise and the advancement of individual and national wealth and prosperity. The rules of law are founded on natural reason and justice, and are shaped by the wisdom of human experience, and upon subjects like the one which we are considering they are well defined and settled. If representations are made by one party to a trade which may be reasonably relied upon by the other party (and they constitute a material inducement to the contract) and such representations are false within the knowledge of the party making

them, and they cause loss and damage to the party relying on them, and he has acted with ordinary prudence in the matter, he is entitled to relief in any court of justice."

Fraud in the execution of an instrument, as distinguished from fraud in the representation, may be said to go to the issue of *non est factum,* while fraud in the agreement, *colloquium,* or negotiation, leading to the execution of the instrument, deals only with the treaty. The one relates to the execution of the memorial of the agreement, the other to the meeting of the minds preceding the execution of the instrument. *Currie v. Malloy, supra.*

Because of some apparent contrariety in its use, it may be well to note that the expression "fraud in the procurement," as used in some of the cases, relates to fraud in procuring the execution of the instrument, in which event, the reference is to fraud in the *factum,* while in others it is used in connection with fraud inducing the agreement, in which sense, its meaning has reference to fraud in the treaty. *Machine Co. v. Feezer, supra; Harvester Co. v. Carter, supra; Colt v. Kimball, ante,* p. 173, and cases there cited.

Fraud is the overreaching of one person by another, and yet this definition is as broad as the term itself. It has been said that fraud, actual and constructive, is so multiform as to admit of no rules or definitions. "It is, indeed, a part of equity doctrine not to define it," says *Lord Hardwicke,* "lest the craft of men should find a way of committing fraud which might escape such a rule or definition." *Oil Co. v. Hunt,* 187 N. C., p. 159.

Animadverting upon the inclusive nature and meaning of the word "fraud," *Dick, J.,* in *Walsh v. Hall,* 66 N. C., p. 239, said:

"No specific rule can be laid down as to what false representations will constitute fraud, as this depends upon the particular facts which have occurred in each case, the relative situation of the parties and their means of information. Examples are given in the books, which have established some general principles which will apply to most cases that may arise. If the falsehood of the misrepresentation is patent, and a party accepts and acts upon it with 'his eyes open' he has no right to complain. If the parties have equal means of information, the rule of *caveat emptor* applies, and an injured party cannot have redress if he fail to avail himself of the sources of information which he may readily reach, unless he has been prevented from making proper inquiry by some artifice or contrivance of the other party. Where the false representation is a mere expression of commendation, or is simply a matter of opinion, the parties stand upon equal footing, and the courts will not interfere to correct errors of judgment. Where a matter which forms a material inducement is peculiarly within the knowledge of one

of the parties, and he makes a false representation as to that fact, and the other party, having no reason to suspect fraud, acts upon such statement and suffers damage and loss, he is entitled to relief. Whenever fraud and damage go together, the courts will give a remedy to the injured party. Broom Leg. Maxims, 739." To like effect are the decisions in *Miller v. Mateer,* 172 N. C., p. 406; *Gray v. Jenkins,* 151 N. C., 80; *May v. Loomis,* 140 N. C., 350; *Hill v. Brower,* 76 N. C., 124.

In the instant case, the defendant's plea of fraud in the *factum,* or *non est factum,* if established, is sufficient to relieve him of liability on the instrument in suit, because, in this event, it is a nullity as to him. *Ex nihilo nihil fit.* "From nothing nothing comes."

But the defendant's plea of fraud in the treaty, even if established, will not avail as against the plaintiffs, innocent third persons in the present proceeding, because, in this event, the instrument is only voidable as between the original parties, and binding in the hands of innocent third persons. *Medlin v. Buford, supra.* The principle upon which this conclusion rests is that where one of two innocent persons must suffer from the act of a third, he who has enabled such third person to occasion the loss must sustain it. *Lickbarrow v. Mason,* 2 T. R., 70. Or, as stated in *R. R. v. Kitchin,* 91 N. C., 44, "where one of two persons must suffer loss by the fraud or misconduct of a third person, he who first reposes the confidence, or by his negligent conduct made it possible for the loss to occur, must bear the loss." *Bowers v. Lumber Co.,* 152 N. C., 607; *Bank v. Oil Mills,* 150 N. C., 722; *Rollins v. Ebbs,* 138 N. C., 145; *R. R. v. Barnes,* 104 N. C., 27; *Tarault v. Seip,* 158 N. C., p. 378.

The issue submitted to the jury, it will be observed, fails to make this distinction, and hence we are unable to say upon which plea the jury returned its verdict.

The two defenses—one valid, if established, the other unavailing in the instant suit—were submitted to the jury under a single issue, and the charge of the court, as sent up, is defective in that it fails to draw the distinction between the two pleas and thus falls short of a declaration and explanation of the law arising on the evidence. C. S., 564. Dealing with a similar exception in *Nichols v. Fibre Co., ante,* p. 7, *Connor, J.,* said: "While counsel may argue the law of the case to the jury, both plaintiff and defendant are entitled, as a matter of right, to have the judge declare and explain the law arising on the evidence. A failure to comply with the statute must be held as error." For like reason, a new trial must be awarded in the present case.

New trial.

D. E. KELLY v. THE NEWARK SHOE STORES COMPANY, M. SAMUELS AND COMPANY, INCORPORATED, AND F. L. REDFORD.

(Filed 4 November, 1925.)

1. **Employer and Employee—Master and Servant—Principal and Agent—"General Manager"—Criminal Law.**

One employed as "general manager" of a local branch of a chain of stores operated in several towns, impliedly at least has the control thereof in his locality, with reference to its local employees, and his acts with respect to them are held to be those of the corporation he thus represents.

2. **Same—Torts—False Arrest—Respondeat Superior.**

Where there is evidence that the local "general manager" has had an employee or salesman at his principal's store falsely arrested and imprisoned for the embezzlement of his employer's funds, it is sufficient to be submitted to the jury upon the issue of the employer's liability therefor in an action for damages.

3. **Same—Corporations.**

A corporation is liable for the torts of its employees or servants committed in its behalf within the scope of their employment as in case of individuals.

4. **Indictment—Probable Cause—Criminal Law.**

An indictment for embezzlement in the Superior Court is prima facie probable cause for its prosecution.

APPEAL by defendants from NEW HANOVER Superior Court. *Dunn, J.*

The plaintiff sued defendants, alleging that the defendants, Shoe Stores Company and M. Samuels Company, owned and operated a chain of shoe stores, with F. L. Redford, general manager in charge of the store in Wilmington, and that the plaintiff was employed as a salesman in the Wilmington store; and that in the Wilmington store, on Saturday, 2 July, 1921, Redford, the defendants' general manager, about eleven o'clock at night, in the presence of other people, locked the doors of the store and falsely and maliciously did: (a) charge the plaintiff with embezzlement of $10.00 in money belonging to said store; (b) unlawfully arrest and imprison the plaintiff by locking the doors of said building, and, removing the keys, did hold him under arrest; (c) procure a policeman and deliver the plaintiff to policeman, under arrest, and caused the plaintiff to be taken down front street in a patrol wagon in the presence of crowds, and a warrant to be procured, charging plaintiff with embezzlement, and from which, imprisonment in the city prison ensued; (d) that the said defendants did maliciously prosecute and cause the false imprisonment of plaintiff.

The defendant, M. Samuels and Company, denied the material allegations of the complaint, admitting that plaintiff was employed as a sales-

man in the Wilmington store. At the close of plaintiff's evidence, motion for judgment as of nonsuit was allowed and plaintiff appeals.

Plaintiff's evidence tended to show that plaintiff was experienced in the mercantile business, a man 47 years of age; had been employed by the defendant in the operation of its Wilmington store some three or four months. He was hired by the auditor and manager who came to Wilmington and opened up the store, one Murphy, who left the store in charge of the defendant, Redford, who was general manager of the company's business in this store, with the title of "General Manager"; that Murphy, who started the store hired the plaintiff and turned him over to Redford; that the help for the store was all employed when Redford came, except the cashier, Mr. Wooten's wife, who was employed by Redford; that Redford paid off the help; that plaintiff was receiving $12.00 per week and a commission of 5% on his sales of shoes and 10% on sales of findings; that Redford paid the salaries, but sent in a statement showing what the commissions were, and checks with employees' names on them were forwarded from headquarters and cashed by the local store. That after plaintiff had been working a little while, he quit, because his commission check was not showing up as it should, but was hired back by Redford; that when he left, the defendant gave him a letter of recommendation, and that he came back to work at the request of the defendant, through Redford; that on 2 July, 1921, his commission checks were not coming as plaintiff contended they ought to come; that Mrs. Wooten, the cashier, kept the commission tickets; that plaintiff and Wooten were the two salesmen; that Mr. Redford sold occasionally. When a pair of shoes was sold, the plaintiff put down the stock number, the size of the shoe, the number of the shoe and the cost, on the ticket, and the money was delivered to the cashier. The manager computed the tickets and figured up the commission. The salesmen did not handle the tickets or cash after delivering them to the cashier. That they were not giving plaintiff credit for the amount of stock he was selling; that he kept the account himself; that on 2 July, about 12 o'clock, plaintiff told Redford that he was going to quit that night for good and always; that Redford kept after him during the day to remain, and he refused; that plaintiff worked until about 10 or 10:30 that Saturday night, which was the regular time for an inventory; that while plaintiff was putting up the shoes that had been taken down, Redford went to the back door and locked it and snatched the key out, breaking the string, and locked the other door and took the key out. Plaintiff was putting up the shoes and Mr. and Mrs. Wooten were standing there and the plaintiff began to take the inventory when

Redford came up and said to him in the presence of others, "Kelly, you have stolen $10.00 of the company's money and you have it in your pocket and I want it." Plaintiff said, "I have not a penny of the company's money nor any one else's money but my own. Redford said that I did, and a controversy and fight started and Wooten ran in between us and stopped the fight and Mrs. Wooten was scared and I walked off to one side." In a few minutes the policeman came and the store was crowded with men and Redford said to the policeman: "This man has ten dollars of the company's money and I want you to take him and lock him up unless he gives it to us." The plaintiff said, "I have nothing except that which belongs to me." The street was full of people. The plaintiff was arrested by the policeman and brought out on the street before all the people, put in the "Black Maria" and carried to the police station. Redford was with plaintiff all the time. When we got to the police station he swore out a warrant charging the plaintiff with embezzlement of $10.00. Plaintiff was searched in Redford's presence and had on his person twenty-eight dollars and some few cents—two ten dollar bills, one five and three ones. This money was made up as follows: Two ten dollar bills and one five, from the Atkinson rent check for $25.00, the balance of $5.00 from a check cashed by the Newark Stores Co., after paying the dollar to the washwoman, and some change for plaintiff's child to go to the moving pictures. The $25.00 check was identified, as well as the $5.00 check, both dated 1 July, 1921.

Redford remained with the plaintiff from the time he locked the doors until plaintiff was searched, not leaving him more than two feet at any time. Plaintiff was locked up in the city prison all night. He arranged bond next morning and got out about ten o'clock. Redford prosecuted the case before the recorder; that both he and Murphy, the auditor, sat with the prosecution at the trial; that the first case was *nol. prossed.* This warrant charged larceny of $10.00 in money, the property of F. L. Redford. As soon as plaintiff was released another warrant was sworn out and he was rearrested and this case was sent up to the Superior Court; that his arrest and imprisonment and trial were published in the newspapers; that he had never been in trouble before, and since that has been unable to get employment, except temporarily; that he suffered humiliation; that plaintiff was indicted in the Superior Court for embezzlement, was tried and acquitted by a jury verdict. Mr. and Mrs. Wooten were witnesses for the prosecution and they testified that he took some money; that Redford said they told him that he took it; and that plaintiff's general reputation was good.

Upon conclusion of plaintiff's evidence, the defendants, M. Samuels, Incorporated, and Newark Shoe Stores Company, moved for judgment as of nonsuit, which was allowed, and the plaintiff excepted and appealed.

Weeks & Cox and Fowler & Crumpler for plaintiff.
Ruark & Campbell for defendants.

VARSER, J. The plaintiff, the salesman of the defendants' Wilmington Shoe Store, was employed first by Murphy, who was called both auditor and manager, who travels around and gets each store into operating condition and installs the employees and then, evidently, performs the duties of auditor afterwards. The defendant, Redford, was employed by Murphy and given the title of "general manager" of the Wilmington store. Redford was in charge of the Wilmington store and employed the help, after the business was started off by Murphy. When the plaintiff became dissatisfied and quit, he was hired again by Redford and so was the cashier. There is ample evidence outside of the title of Redford that he was in the general charge of defendants' store. He computed and handled the commission accounts of each employee. As manager, or general manager, he was in general charge of the defendants' Wilmington store; had general supervision and control over this business in all respects. The term "manager," applied to an officer or representative of a corporation, implies the idea that the management of the affairs of the company has been committed to him with respect to the property and business under his charge. Consequently, his acts in and about the corporation's business, so committed to him, is within the scope of his authority. 5 Words and Phrases, 4319; *Sullivan v. Evans-Morris-Whitney Co.*, 54 Utah, 293. The designation "manager" implies general power, and permits a reasonable inference that he was invested with the general conduct and control of the defendants' business centered in and about their Wilmington store, and his acts are, when committed in the line of his duty and in the scope of his employment, those of the company. *Whipple v. Insurance Co.*, 222 N. Y., 39, 46; *Sanders v. Marble Co.*, 25 Wash., 475; *Taylor v. Granite State Provident Asso.*, 136 N. Y., 343; *Stewart v. Union Mutual Life Ins. Co.*, 155 N. Y., 257; *American Car & Foundry Co. v. Alexandria Water Co.*, 218 Pa. St., 542; *Commonwealth v. Johnson*, 144 Pa. St., 377; *Ives v. Insurance Co.*, 78 Hun., 32. The term "manager" implies the exercise of judgment and skill. *Roberts v. State*, 26 Fla., 360; *Ure v. Ure*, 185 Ill., 216; *Youngworth v. Jewell*, 15 Nev., 48; *Watson v. Cleveland*, 21 Conn., 541; Black's Law Dictionary, 2 ed., 752; *American Inv. Co., v. Cable Co.*, 60 S. E., 1037 (Ga.); *State v. Hemenover*, 188 Mo., 381.

The term "general manager" may imply still greater authority, and, although limited to the branch store at Wilmington, it still may imply the authority to act in emergencies, or generally, as the principal officer of the corporation in reference to the ordinary business and purposes of the corporation in the conduct of such store. *Mining Co. v. Refining Co.*, 16 Col., 118; *Kansas City v. Cullinan*, 65 Kansas, 68; *Railway Co., v. McVay*, 98 Ind., 391; *Gas Light Co., v. Lansden*, 172 U. S. 534; *Camcho v. Engraving Co.*, 37 N. Y., Supp., 725.

The difficulty in this case arises, not in determining whether the evidence, viewed in its most favorable light for the plaintiff tends to establish slander and false imprisonment, and false arrest and malicious prosecution, but in determining whether these acts of Redford were such as to invoke the rule of *respondeat superior*. This doctrine is based on the maxim *qui per alium facit per seipsum facere videtur*. Whether this maxim applies, with resultant liability to the defendant Samuels & Company, depends upon whether Redford's acts were done in the line of his duty, or within the scope of his employment. *Sawyer v. Gilmers*, 189 N. C., 7; *Cotton v. Fisheries Products Co.*, 177 N. C., 57; *S. v. Williams*, 186 N. C., 627; *Gallop v. Clark*, 188 N. C., 186; *Jackson v. Telegraph Co.*, 139 N. C., 348; *Pierce v. R. R.*, 124 N. C., 93; *Cook v. R. R.*, 128 N. C., 333. Liability does not flow from the employee's intent to benefit or serve the master, but it does flow from the acts of the servant or employee in attempting to do what he was employed to do, that is, the acts complained of must have been done in the line of his duty, and within the scope of his employment. *Butler v. Mfg. Co.*, 182 N. C., 547; *Daniel v. R. R.*, 136 N. C., 517; *Munick v. Durham*, 181 N. C., 188; *Clark v. Bland*, 181 N. C., 112; *Roberts v. R. R.*, 143 N. C., 176.

We conclude, therefore, that it was error on the part of the trial court in withdrawing this cause from the jury.

Plaintiff contends that he was maliciously prosecuted, falsely imprisoned and illegally assaulted and searched at Redford's instance after he was carried from the defendants' store under such circumstances as to impose liability on the defendant.

The indictment had in the Superior Court of New Hanover County is prima facie probable cause for the prosecution. *Stanford v. Grocery Co.*, 143 N. C., 419.

There is not sufficient evidence in the record for this Court to determine whether, as to the evidence transpiring after Redford and the plaintiff left the defendants' store, comes within the rules announced in *Minter v. Express Co.*, 153 N. C., 507; *Daniel v. R. R., supra; Allen v. R. R.*, L. R., 6 Q. B., 65, or under the rules announced, with reference to past offenses, in *Berry v. R. R.*, 155 N. C., 287; *Minter v. Express Co.*,

supra; Dover v. Mfg. Co., 157 N. C., 324-327; *Cooper v. R. R.*, 165 N. C., 578, 582; *Butler v. Mfg. Co.*, 185 N. C., 250, 252.

If it shall appear that such acts, after leaving the store, were within the scope of Redford's employment and in his line of duty, or that such acts were authorized or ratified by the defendant, then the settled principles announced in *Sawyer v. R. R.*, 142 N. C., 1, 8; *Gallop v. Clark, supra; Jones v. R. R.*, 150 N. C., 473, 476; *Marlowe v. Bland*, 154 N. C., 140, 143, 145; *Sawyer v. Gilmers, supra*, would apply.

The defendant Samuels & Company obtains no exemption from liability for torts on account of its corporate capacity (*Hussey v. R. R.*, 98 N. C., 34; 2 Am. State Reports, 312; *Denver R. R. Co. v. Harris*, 122 U. S., 597), but it is liable for the acts of its servants and agents in the same degree as natural persons are liable for the acts of their servants and agents. Beach on Private Corporations, Par. 455; *Goodspeed v. Bank*, 22 Conn., 536; *Wachsmuth v. Bank*, 96 Mich., 426; *Evansville & Terre Haute Ry. Co. v. McKee*, 99 Ind., 519; *Redditt v. Mfg. Co.*, 124 N. C., 100; *Sawyer v. R. R., supra; Ange v. Woodmen*, 173 N. C., 33, 35; *Strickland v. Kress*, 183 N. C., 534, 537. This latter case marks with distinctive clearness the line of demarcation in the scope of employment of a manager of a store.

Viewing this case in its most favorable light for the plaintiff, we conclude that there is sufficient evidence to be submitted to the jury for them to determine whether, under proper instructions from the court, the arrest and search and imprisonment and prosecution which took place after the plaintiff left or was carried from defendants' store, was a continuation of the same tort committed by Redford within the store. *Berry v. R. R., supra; Jackson v. Telegraph Co., supra; Marlowe v. Bland, supra; Denver R. R. Co. v. Harris, supra.*

Therefore, to the end that there may be a new trial in accordance with this opinion, the judgment of nonsuit is

Reversed.

KELLY SPRINGFIELD TIRE COMPANY AND F. E. WALKER v. W. P. LESTER AND WIFE, FLORENCE LESTER.

(Filed 4 November, 1925.)

1. Deeds and Conveyances—Fraud—Debtor and Creditor—Trusts.

The principles of law that will avoid a deed to lands for fraud against the grantor's creditors, does not apply to lands held by the grantor in a resulting trust.

2. Same—Evidence—Directing Verdict—Nonsuit—Appeal and Error.

Where in a suit to set aside a deed to lands brought by the creditors of the grantor, the evidence is conflicting as to whether or not he held the naked legal title, or in resulting trust for another, an instruction directing a verdict upon the evidence in plaintiff's favor, is reversible error.

3. Trusts—Payment of Purchase Money—Title—Deeds and Conveyances.

Where a purchaser of lands furnishes the money therefor and has the naked legal title conveyed to another, the presumption is, except in conveyances from a husband to his wife, the creation of a resulting trust for the benefit of the one furnishing the purchase price.

4. Same—Husband and Wife.

With the proceeds of the sale from his wife's land the husband bought another tract of land, and took title in himself, and thereafter conveyed the legal title to his wife. The creditors of the husband brought suit to set aside this conveyance as fraudulent against them, and the evidence was conflicting as to whether or not the husband held the title in trust for his wife: *Held*, reversible error for the court to direct a verdict upon the evidence in favor of plaintiffs.

5. Trusts—Resulting Trusts.

A resulting trust arises: 1, when the purchaser pays the purchase money, but takes title in the name of another; 2, where a trustee or other fiduciary buys property in his own name with trust funds; 3, where the trusts of a conveyance are not declared, or are partially declared or fail; 4, where a conveyance is made without any consideration, and it appears from circumstances that the grantee was not to take beneficially.

6. Same—Evidence — Quantum of Proof — Instructions — Questions for Jury.

In order to establish a resulting trust, the proof must be clear, cogent, and convincing, which is for the jury to determine upon the evidence under proper instructions from the court.

7. Same—Partnership—Principal and Agent.

In a suit by the creditors to set aside a deed to lands from the husband to his wife as fraudulent against them, it is competent when relevant for the husband to introduce and testify to a financial statement made by himself of a partnership of which he was a member at the time of the transaction complained of upon the question of whether he had retained property sufficient to pay his debts.

APPEAL by defendants from HOKE Superior Court. *Grady, J.*

Action by plaintiffs, judgment creditors of W. P. Lester, against defendants to set aside a deed from W. P. Lester to Florence Lester, his wife, under C. S., 1005, 13 Eliz., ch. 5, sec. 2. From a judgment in favor of plaintiffs on a directed verdict, the defendants appealed.

The plaintiffs are creditors of W. P. Lester, and bring this action to set aside a deed from W. P. Lester to Florence Lester, dated 18 March, 1922, duly registered, and conveying some 190 acres of valuable land.

The defendants allege that W. P. Lester, who was a partner with T. B. Lester, as W. P. Lester & Company, knew nothing of the firm's business, and that T. B. Lester made all contracts, and incurred all the firm debts, and that the deed in controversy was executed by him to his wife, Florence Lester, "upon the consideration and for the purpose of conveying to her her rightful interest in said property according to the amount of money expended by W. P. Lester for her in the purchase of the lands conveyed," and denied the fraud and other material allegations, but admitted the debts sued on.

The defendants' evidence tended to show that W. P. Lester was the husband of Florence Lester, and was connected with W. P. Lester and Company as a partner, but had nothing to do with the management of the garage business and knew nothing of the company's status, but admitted the execution of the deed to his wife; that upon the death of Florence Lester's father, she received $1,100.00, which she "let me have in reference to settling up some debts," about 20 years ago; that this money was used in paying for the mortgage on the place on which they were then living in South Carolina; that the money used in buying land in controversy "belonged to my wife and myself. I thought she ought to have half of it. She was not liable for any of the indebtedness that I paid, the $1,400 mortgage. That was not my individual indebtedness, but some that I stood for." That W. P. Lester did not own any property after he made the conveyance in controversy.

It was admitted that, about 20 years ago, certain lands of Mrs. Lester were sold in South Carolina for $1,100 and this money was used by W. P. Lester in buying various tracts of land, upon which larger profits were made, and that this money was used in buying lands in controversy. No claim was made that any actual money was paid at the time of this last purchase by Mrs. Lester.

The defendants excepted to the admission of the financial statement given by W. P. Lester & Company through T. B. Lester, one of the partners, to R. J. Dun & Company, a mercantile agency, and to the refusal of the court to allow their motion for judgment as of nonsuit made in apt time.

The court submitted the following issues:

"1. Was the deed from W. P. Lester to his wife, Florence Lester, made in consideration of a preëxisting debt, due by said W. P. Lester to his said wife?

"2. Was there, at the time of said deed, any present valuable consideration moving from said Florence Lester, to W. P. Lester?

"3. At the time of the execution of said deed, did W. P. Lester reserve to himself property fully sufficient and available for the satisfaction of his then creditors?"

There was evidence tending to show the contentions of the plaintiffs.

The court charged the jury that, if they found the facts to be true as testified to by all the witnesses, to answer the first issue "Yes," the second issue "No," the third issue "No." Defendants excepted to these directions. The jury rendered a verdict as directed, and from a judgment declaring the deed void, the defendants excepted and appealed.

H. W. B. Whitley and J. W. Currie for plaintiffs.
G. B. Rowland and Smith & McQueen for defendants.

VARSER, J. The evidence tends to sustain the contentions of both plaintiffs and the defendants, and therefore appropriate issues must be submitted to the jury in order for the facts to be determined.

The principles relating to fraudulent conveyances are set out in *Aman v. Walker,* 165 N. C., 227, by the late *Justice Allen,* as follows:

"(1) If the conveyance is voluntary, and the grantor retains property fully sufficient and available to pay his debts then existing, and there is no actual intent to defraud, the conveyance is valid.

"(2) If the conveyance is voluntary, and the grantor did not retain property fully sufficient and available to pay his debts then existing, it is invalid as to creditors; but it cannot be impeached by subsequent creditors without proof of the existence of a debt at the time of its execution, which is unpaid, and when this is established and the conveyance avoided, subsequent creditors are let in and the property is subjected to the payment of creditors generally.

"(3) If the conveyance is voluntary and made with the actual intent upon the part of the grantor to defraud creditors, it is void, although this fraudulent intent is not participated in by the grantee, and although property sufficient and available to pay existing debts is retained.

"(4) If the conveyance is upon a valuable consideration and made with the actual intent to defraud creditors upon the part of the grantor alone, not participated in by the grantee and of which intent he had no notice, it is valid.

"(5) If the conveyance is upon a valuable consideration, but made with the actual intent to defraud creditors on the part of the grantor, participated in by the grantee or of which he has notice, it is void."

These principles are approved in the following authorities: *Black v. Sanders,* 46 N. C., 67; *Warren v. Makely,* 85 N. C., 14; *Credle v. Carrawan,* 64 N. C., 424; *Worthy v. Brady,* 91 N. C., 268; *Savage v. Knight,* 92 N. C., 498; *Clement v. Cozart,* 112 N. C., 420; *Hobbs v. Cashwell,* 152 N. C., 188; *Powell v. Lumber Co.,* 153 N. C., 58; *Cox v.*

Wall, 132 N. C., 730; *Morgan v. Bostic*, 132 N. C., 743; *Michael v. Moore*, 157 N. C., 462; *Pennell v. Robinson*, 164 N. C., 257; *Smathers v. Hotel Co.*, 168 N. C., 69, 70; *Garland v. Arrowood*, 177 N. C., 371; *Bank v. Pack*, 178 N. C., 391.

These principles, however, relate to fraudulent conveyances of land that is the property of the grantor therein, and do not apply to the conveyance of property held by a mere naked trust, for another who is, in equity, the real, or beneficial, or equitable owner.

The evidence in the case at bar is ample to sustain the verdict under a proper charge which submits to the jury the contentions in the complaint, and in the answer.

However, if there is a resulting trust in favor of the defendant, Florence Lester, by virtue of the payment of the purchase money out of *her* funds, then W. P. Lester has no such beneficial interest in the McNair lands as may be subjected to the payment of W. P. Lester's debts.

A trust for the sole benefit of another does not support dower for the trustee's widow (*Hendren v. Hendren*, 153 N. C., 505; *Pridgen v. Pridgen, ante*, 102), and the trustee has no such interest in the land as may be subjected to the payment of *his* debts. Mordecai's Law Lectures, 312, 314, 316, 787, 987, 997; *Thurber v. LaRoque*, 105 N. C., 301; *Arrington v. Arrington*, 114 N. C., 116; *Evans v. Cullens*, 122 N. C., 55.

If a resulting trust is established the McNair land is, *ab initio*, the estate, the interest, the property of Florence Lester, and is liable for her debts, as provided by law, and subject to her right of alienation. Mordecai's Law Lectures, 997, 998, *et seq.*; *Holmes v. Holmes*, 86 N. C., 205, 208; *Bank v. Clapp*, 76 N. C., 482; *Miller v. Bingham*, 36 N. C., 423; *Rouse v. Rouse*, 167 N. C., 211; *Harris v. Harris*, 42 N. C., 116; *Carson v. Carson*, 62 N. C., 58; *Cheatham v. Rowland*, 92 N. C., 344; *Hollowell v. Manly*, 179 N. C., 264; *Whichard v. Whitehurst*, 181 N. C., 80; *Bond v. Moore*, 90 N. C., 242; *Dover v. Rhea*, 108 N. C., 92; *Fulbright v. Yoder*, 113 N. C., 457; *Clark v. Cox*, 115 N. C., 96; *Helms v. Austin*, 116 N. C., 753; *Wilson v. Leary*, 120 N. C., 91; *Allen v. Baskerville*, 123 N. C., 127; *Johnson v. Blake*, 124 N. C., 109, 111; *Smith v. Proctor*, 139 N. C., 319; *Gaylord v. Gaylord*, 150 N. C., 237.

Hence there arises the inquiry whether, upon any view of the evidence, taken in its most favorable light for the defendant, Florence Lester, a resulting trust arises. We are of the opinion that, when so considered, it does arise. *Lord Chief Baron Eyre* in *Dyer v. Dyer*, 2 Cox, ch. 93, gives the nature of resulting trusts of the kind invoked

as follows: "The clear result of all the cases, without a single exception, is that the trust of a legal estate, whether taken in the name of the purchaser, and others jointly or in the names of others without the purchaser, whether in one or several, whether jointly or successive, results to the man who advances the purchase money."

The classes of resulting trusts may be stated thus:

(1) Where a purchaser pays the purchase money, but takes the title in the name of another; (2) where a trustee or other fiduciary buys property in his own name, but with trust fund; (3) where the trusts of a conveyance are not declared, or are only partially declared, or fail; and (4) where a conveyance is made without any consideration, and it appears from circumstances that the grantee was not intended to take beneficially. *Williams v. Williams,* 108 Iowa, 91; *Avery v. Stewart,* 136 N. C., 426; Bispham's Equity (9 ed.), 146.

The first class of resulting trusts as defined by *Lord Chief Baron Eyre* is the kind of trust set up by defendant. It is in force in this State, as well as in the other courts of this country, except where modified by statutory enactment. *Cobb v. Edwards,* 117 N. C., 246; *Sherrod v. Dixon,* 120 N. C., 63; *Gorrell v. Alspaugh,* 120 N. C., 367; *Hughes v. Pritchard,* 122 N. C., 61; *Owens v. Williams,* 130 N. C., 168; *Sykes v. Boone,* 132 N. C., 203; *Gaylord v. Gaylord,* 150 N. C., 227; *Lehew v. Hewett,* 138 N. C., 11; *Ferguson v. Haas,* 64 N. C., 776; *Shields v. Whitaker,* 82 N. C., 520; *Holden v. Strickland,* 116 N. C., 191.

The payment of the purchase money raises a resulting trust in favor of him who "furnishes" or "pays" or "owns" the purchase money, unless a contrary intention, or a contrary presumption of law, prevents. *Holden v. Strickland, supra; Leggett v. Leggett,* 88 N. C., 108; *Thurber v. LaRoque, supra; Cobb v. Edwards, supra; Henderson v. Hoke,* 21 N. C., 119; *Moseley v. Moseley,* 87 N. C., 69; *Norton v. McDevit,* 122 N. C., 755; Perry on Trusts and Trustees (6 ed.), 184, sec. 125 *et seq.;* Bispham's Equity, *supra; Rush v. McPherson,* 176 N. C., 562; *Harris v. Harris,* 178 N. C., 7. This trust arises between husband and wife, in favor of the wife, when land was deeded to both husband and wife. *Deese v. Deese,* 176 N. C., 527; *Ross v. Hendrix,* 110 N. C., 403; *Houck v. Somers,* 118 N. C., 607; *Ricks v. Wilson,* 154 N. C., 282; *Ray v. Long,* 128 N. C., 90; *Cunningham v. Bell,* 83 N. C., 328; 6 L. R. A. (N. S.), 383, citing many cases in this, and other states, in which this same rule has been held to apply. Consent that title be made in another's name did not prevent a resulting trust in *Summers v. Moore,* 113 N. C., 394.

The contrary rule applies to the husband because the law presumes he made the deed to his wife as a gift. *Nelson v. Nelson,* 176 N. C., 191; *Singleton v. Cherry,* 168 N. C., 402.

Even when a part payment is made the trust results *pro tanto* in favor of the owner of the funds. *McWhirter v. McWhirter* 155 N. C., 145; *Keaton v. Cobb*, 16 N. C., 439.

The doctrine of resulting trusts is plainly set forth by *Mr. Justice Adams* in *Tyndall v. Tyndall*, 186 N. C., 272.

In order to establish a resulting trust, the proof must be clear, cogent and convincing. *Harris v. Harris, supra; Glenn v. Glenn*, 169 N. C., 729; *Summers v. Moore, supra; McWhirter v. McWhirter*, 155 N. C., 145; *Hendren v. Hendren*, 153 N. C., 505; *Wilson v. Brown*, 134 N. C., 400.

When properly submitted to the jury they determine whether the proof measures up to this test. *McWhirter v. McWhirter, supra; Lehew v. Hewett*, 130 N. C., 22; *Cobb v. Edwards, supra; Hemphill v. Hemphill*, 99 N. C., 436; *Earnhardt v. Clement*, 137 N. C., 95; *Ray v. Long*, 132 N. C., 894; *Jones v. Warren*, 134 N. C., 392; *Avery v. Stewart*, 136 N. C., 431; *Davis v. Kerr*, 141 N. C., 19; *Taylor v. Wahab*, 154 N. C., 219; *Cuthbertson v. Morgan*, 149 N. C., 76; *Archer v. McClure*, 166 N. C., 140, 148; *Lefkowitz v. Silver*, 182 N. C., 349; *Cunningham v. Bell, supra.*

Applying the foregoing principles, and viewing the evidence as we are required to do in a case of directed verdicts and involuntary nonsuits, we are constrained to hold that there was error in directing a verdict in favor of the plaintiffs on the first issue, but there is no error in directing a verdict in favor of the plaintiffs on the second and third issues. The defendant, Florence Lester, is entitled to have an issue submitted to the jury to determine whether she is the owner of the lands in controversy by virtue of a resulting trust arising from the payment of the purchase money out of her funds, in whole or in part.

This disposes of the defendants' exceptions, save the competency of the financial statement given by the firm of W. P. Lester & Company, through T. B. Lester, which was offered in evidence. This evidence, in our opinion, was competent, upon plaintiffs' contentions that this transaction was a voluntary conveyance by the defendant, W. P. Lester, of his only property to his wife, Florence Lester, to hinder, delay and defraud creditors. *Bank v. Odom*, 188 N. C., 672; 2 Wigmore on Evidence (2 ed.), sec. 1077, p. 584. The partnership relations were ample and sufficient to authorize T. B. Lester to make financial statements with reference to their business and the credit status of the firm and *pro hac vice* T. B. Lester was the agent of W. P. Lester and, therefore, the maxim *qui per alium facit per se* applies.

Mrs. Lester's objection to the competency of this statement cannot avail, for that, if the facts come within the principles announced in *Aman v. Walker, supra*, and she paid no valuable consideration for the

conveyance of her husband's property to her, she is affected by W. P. Lester's acts, however innocent she may be of any knowledge of them. If, however, the resulting trust in her favor is established, she is not affected by W. P. Lester's acts with reference to creditors, and judgment will be entered in her favor.

To the end that a new trial may be had on the first issue and on the plea of resulting trust, the judgment is reversed.

New trial.

W. B. ELLIS v. CLARA N. ELLIS.

(Filed 4 November, 1925.)

1. Divorce—Marriage—Separation—Statutes—Actions—Cross-Actions.

The defendant in an action for divorce *a vinculo*, may file a cross-action for the same relief, and where no reply has been filed by the plaintiff, and no evidence offered by him, an issue is raised by our statute (C. S., 1662), and upon a verdict on the required issues, a judgment may be rendered upon the cross-action if the pleadings and evidence are sufficient.

2. Same—Issues—Residence—Judgment.

For the granting of a divorce for the five-year separation of husband and wife under the provisions of our statute, C. S., 1659 (4), there must not only be evidence but a determinative issue answered in the affirmative as to the necessary period of residence, and a judgment rendered upon an issue establishing only a two years residence in this State by the plaintiff is insufficient, and a judgment signed thereon improvidently rendered. The changes made by the Public Laws of 1925 commented upon by STACY, C. J.

3. Same—Partial New Trial—Appeal and Error.

Where a judgment has been entered granting a divorce *a vinculo* on the grounds of separation of husband and wife for five years, C. S., 1659 (4), in the absence of finding of the necessary issue as to plaintiff's residence, a motion in the cause to correct this error or omission is proper, and where such appears to be the only and unrelated error committed, the case will be remanded for the submission of this issue only.

APPEAL by plaintiff from *Schenck, J.*, at May Term, 1925, of FORSYTH.

Motion by plaintiff at the May Term, 1925, Forsyth Superior Court, to set aside or vacate the judgment rendered in this cause at the March Term, 1925, Forsyth Superior Court, "for reasons set out in affidavits," which seem to be: (1) that it is void; (2) that it was entered contrary to the usual course and practice of the court, therefore, irregular; and

(3) that it was taken against the plaintiff through his mistake, inadvertence, surprise or excusable neglect. C. S., 600. Motion denied and plaintiff appeals.

W. B. Ellis in propria persona.

Swink, Clement & Hutchins and Manly, Hendren & Womble for defendant.

STACY, C. J. This suit was instituted by plaintiff, as the alleged injured party, for an absolute divorce upon the ground that there has been a separation between himself and the defendant, his wife, and that they have lived separate and apart for more than five successive years prior to the institution of the action. C. S., 1659. There is no specific allegation in the complaint that the plaintiff has resided in this State for the requisite 5-year period of separation.

In her answer, the defendant sets up a cross-action, which is permissible under our practice (*Cook v. Cook,* 159 N. C., p. 50), alleges that she is the injured party, and applies for an absolute divorce from the plaintiff upon the ground that there has been a separation between herself and the plaintiff, her husband; that they have lived separate and apart for more than five successive years prior to the institution of the action, and that she has resided in this State, not only for the requisite 5-year period of separation, but for a much longer time, to wit, all her life.

Upon the issues raised by the defendant's cross-action—no evidence having been offered by the plaintiff to sustain the allegations of his complaint—the jury empanelled at the March Term, 1925, Forsyth Superior Court, to try the cause, returned the following verdict:

"1. Were the plaintiff and defendant married as alleged in the pleadings? Answer: Yes.

"2. Has the defendant been a resident of the State of North Carolina for more than two years prior to the bringing of this suit? Answer: Yes.

"3. Has there been a separation of the plaintiff and defendant for five years prior to the bringing of this action, as alleged in the answer? Answer: Yes."

There was a judgment on this verdict in favor of the defendant, plaintiff in the cross-action, dissolving the bonds of matrimony existing between the parties, under authority of C. S., 1659, subsection 4, which, as amended by chap. 63, Public Laws 1921, is as follows:

"Marriages may be dissolved and the parties thereto divorced from the bonds of matrimony, on application of the party injured, made as by law provided, in the following cases:

"4. If there has been a separation of husband and wife, and they have lived separate and apart for five successive years, and the plaintiff in the suit for divorce has resided in this State for that period."

It will be observed that the separation of husband and wife, and their living separate and apart for five successive years, are not sufficient grounds for divorce under the statute, but in addition thereto, the plaintiff in the suit for divorce must have resided in this State for that period. Such residence is an integral part of the cause for divorce as given by this subsection. The reason for such requirement is obvious. At any rate, *ita lex scripta est.* By the express terms of the statute, a marriage may be dissolved and the parties thereto divorced from the bonds of matrimony, on application of the party injured, made as by law provided:

1. If there has been a separation of husband and wife;
2. And they have lived separate and apart for five successive years;
3. And the plaintiff in the suit for divorce has resided in this State for that period.

For a history of the statutory changes and amendments relating to this particular cause for divorce, see opinions in *Cooke v. Cooke,* 164 N. C., 272, and *Sanderson v. Sanderson,* 178 N. C., 339.

Here, the defendant, who is the plaintiff, *pro hac vice,* in her suit for divorce, as set up in her cross-action, alleges that there has been a separation between herself and the plaintiff, her husband; that they have lived separate and apart for more than five successive years prior to the institution of the action; and that she has resided in this State, not only for the requisite 5-year period of separation, but for a much longer time, to wit, all her life.

The defendant sets up in her cross-action a valid cause for divorce under the statute, but the issues submitted to the jury are not sufficient to support the judgment for divorce. It is not established by the verdict that Mrs. Ellis has resided in this State for the requisite 5-year period of separation. The only issue as to her residence was the second, and this simply finds that she has been a resident of the State of North Carolina "for more than two years prior to the bringing of this suit." That the complainant has been a resident of the State for two years next preceding the filing of the complaint is the necessary allegation required by C. S., 1661, to be incorporated in the affidavit and to accompany the complaint so as to give the court jurisdiction over a divorce proceeding. *Johnson v. Johnson,* 142 N. C., 462; *Hopkins v. Hopkins,* 132 N. C., 22; *Nichols v. Nichols,* 128 N. C., 108. And while this is the length of residence in the State necessary to give the court jurisdiction over the subject of divorce, in an action like the present, where the cause for divorce is bottomed on subsection 4 of C. S., 1659, it is

essential that all the material facts should be alleged in the complaint and "found by a jury" before the court would be warranted in entering a decree dissolving the bonds of matrimony existing between the parties. *Zimmerman v. Zimmerman,* 113 N. C., p. 435.

True, no answer was interposed by the plaintiff to the complaint filed by his wife in her cross-action, but the material facts in every complaint asking for a divorce, are deemed to be denied under the statute, and no judgment is allowed to be given in favor of the plaintiff in any such complaint until all the material facts have been found by a jury. The pertinent provisions of C. S., 1662, are as follows: "The material facts in every complaint asking for a divorce shall be deemed to be denied by the defendant, whether the same shall be actually denied by pleading or not, and no judgment shall be given in favor of the plaintiff in any such complaint until such facts have been found by a jury."

"The object of this provision is to prevent the obtaining of divorces by collusion"—*Clark, J.,* in *Hall v. Hall,* 131 N. C., 185.

The judgment of divorce, therefore, was entered directly contrary to the statute, which provides that "no judgment shall be given in favor of the plaintiff in any such complaint until such facts have been found by a jury." The material facts have not been found by the jury in the instant case, and hence the court was without power or authority to enter the judgment dissolving the bonds of matrimony existing between the parties. *Bank v. Broom Co.,* 188 N. C., 508. A judgment of divorce entered without power or authority on the part of the court to render it is void. *Clark v. Homes,* 189 N. C., p. 708. To hold otherwise would be to sanction a divorce for cause not given by statute; and causes for divorce are statutory in North Carolina. C. S., 1659 and 1660. "If a judgment is void, it must be from one or more of the following causes: 1. Want of jurisdiction over the subject-matter; 2. Want of jurisdiction over the parties to the action, or some of them; or 3. Want of power to grant the relief contained in the judgment. In pronouncing judgments of the first and second classes, the court acts without judisdiction, while in those of the third class it acts in excess of jurisdiction." Freeman on Judgments (4 ed.), p. 176.

Jurisdiction over the subject-matter of divorce is given only by statute, and in the same grant judgments in favor of the plaintiff dissolving the bonds of matrimony are prohibited, except upon a finding of the material facts by a jury. And further, as said by Mr. Black in his valuable work on judgments, vol. I (2d ed.), p. 271, "When we speak of 'jurisdiction of the subject-matter,' we do not mean merely cognizance of the general class of actions to which the action in question belongs, but we also mean legal power to pass upon and decide the particular contention which the judgment assumes to settle."

The result might be otherwise if the judgment were not in favor of the plaintiff in the complaint asking for a divorce (*Hall v. Hall, supra*), or if it were a controversy between the parties in a civil action relating to a different subject-matter. Ordinarily, as to parties properly before the court, and respecting a matter within its jurisdiction, the cases hold that a judgment without a finding of facts to support it is not void, but at most merely erroneous, and subject to reversal by a suitable proceeding in a tribunal having authority to review it. *Connolly v. Miller,* 22 Neb., 82, 34 N. W., 76; *Doty v. Sumner,* 12 Neb., 378, 11 N. W., 464.

Our present position in no way militates against the established principle that where the court has jurisdiction of both the subject-matter and the parties and acts within its power, the binding force and effect of a judgment is not impaired because the same has been erroneously allowed, though the error may be undoubted and apparent on the face of the record. *King v. R. R.,* 184 N. C., p. 446, and cases there cited. An erroneous judgment should be corrected by appeal or *certiorari. Phillips v. Ray, ante,* 152; *Duffer v. Brunson,* 188 N. C., p. 791; *Moore v. Packer,* 174 N. C., 665. But a void judgment may be impeached collaterally or by direct attack. *Starnes v. Thompson,* 173 N. C., p. 468. In the instant case, appellant has proceeded by motion in the cause, which is an appropriate method. *Massie v. Hainey,* 165 N. C., 174, and cases there cited.

While not material to the present case, as it is set forth in the affidavits and alleged in both complaints that the grounds for divorce have existed, not only for six months prior to the filing of the complaints, but for a much longer time, to wit, 15 or 20 years, yet it may be well to note that the Legislature of 1925, amended C. S., 1661 by adding after the word "alimony" in line thirteen of said section the following: "*Provided, however,* that if the cause for divorce is five years separation then it shall not be necessary to set forth in the affidavit that the grounds for divorce have existed at least six months prior to the filing of the complaint, it being the purpose of the act to permit a divorce after a separation of five years and without waiting an additional six months for filing the complaint." Chap. 93, Public Laws 1925.

The plaintiff's motion to set aside or vacate the judgment of divorce entered in this cause at the March Term, 1925, Forsyth Superior Court, should have been allowed. It was error to overrule the motion.

But the vacation of the judgment does not mean that the verdict already rendered should be set aside. No irregularity, mistake, inadvertence, surprise or excusable neglect has been called to our attention which would seem to necessitate its disturbance. The verdict only needs one additional finding to make it complete, to wit, that Mrs. Ellis has

resided in this State for the requisite 5-year period of separation; and on the record now before us, it would appear that such necessary finding can be easily supplied. Failure to submit such an issue, or to incorporate it in those submitted on the trial, was a clear inadvertence, as there is no suggestion of any collusion between the parties. Indeed, quite the opposite is revealed by the record.

This will be certified, to the end that further proceedings may be had as the law directs and the rights of the parties require.

Error.

SWIFT HOOPER v. MERCHANTS BANK & TRUST COMPANY.

(Filed 4 November, 1925.)

1. **Principal and Agent—Special Agency—Bills and Notes—Payment—Attorneys' Fees—Contract—Consideration.**

   Where an agent has only the authority to pay a note due by his principal out of moneys in his hands, it is a special agency for that purpose, and where suit has been instituted on the note and costs incurred therein, the amount due upon the note is the principal, interest and court costs that have accrued to that time, exclusive of counsel fees, which are not recoverable, C. S., 2983, for which there is no consideration.

2. **Same—Notice—Excess Payment—Trusts—Actions.**

   Where a special agent for the payment of a note due by his principal to a bank has exceeded his authority in payment of the bank's attorneys' fees in a suit it had commenced thereon, and the bank has actual knowledge of the agent's limited authority, the money thus wrongfully collected by the bank is held by it to the use of the principal, and he may maintain his action to recover it.

3. **Appeal and Error — Evidence — Objections and Exceptions — Unanswered Questions.**

   Exceptions to the exclusion of evidence will not be sustained on appeal when directed to questions to which no answers appear in the record.

4. **Appeal and Error—Evidence—Harmless Error.**

   Where it appears on appeal that the admission on the trial of evidence excepted to could not have prejudiced the appellant, no reversible error will be found.

5. **Appeal and Error—Issues.**

   Issues submitted will not be held insufficient or their submission erroneous, when the parties have been afforded opportunity to introduce all pertinent evidence and apply it fairly.

APPEAL by defendant from FORSYTH Superior Court. *Schenck, J.*

Action by plaintiff against defendant to recover an alleged overpayment in settlement of a note. Defendant appealed from a judgment on a verdict in the county court. From a judgment affirming the judgment of the county court, defendant appeals. Affirmed.

Plaintiff's evidence tended to show the following:

That he owed the defendant a note in the sum of $2,500 with $22.50 accrued interest; that this note was a renewal representing a balance due the defendant out of a long series of transactions between plaintiff and defendant; that defendant had sued the plaintiff on this note and defendant's agent told plaintiff that the note must be paid; that plaintiff sold some real property to his brother, C. M. Hooper, who assumed mortgages thereon, and as plaintiff's agent, was applying, out of the balance, a sufficient amount to liquidate plaintiff's indebtedness. The note was dated 2 September, 1920, and due one day after date, and was paid 27 October, 1920. On this date plaintiff and his brother, C. M. Hooper, went to the defendant's place of business and asked for the note; that the note was in the office of defendant's counsel who had instituted suit thereon and the defendant sent for the note; that the plaintiff is a locomotive engineer and it became time for him to go to his "run" and he left his brother there to complete the settlement; that when the note was brought into the defendant's bank, discussion took place between the defendant's representative and plaintiff's brother, as to who should pay the attorneys' fee incurred in bringing the suit and plaintiff's brother finally said that, if defendant thought it was right for him to pay it, he would pay it. A check was drawn with the amount of note and interest, and $189.60 additional, making a total of $2,719.40, including $10.00 for costs of the suit pending. This $10.00 is not in controversy.

The defendant's evidence tended to show that there had been a long course of dealings between the plaintiff and defendant; that he had put them to much trouble and annoyance in not meeting his payments when due and had failed to give security promised; and that it was necessary to take steps to collect the note and that this matter was discussed with plaintiff's agent, and the attorneys' fee, in the sum of $189.60, was left with it for defendant's counsel, to whose credit it was immediately placed, and that such payment was voluntarily made by plaintiff's agent who either had the authority or the apparent authority to make such payment.

Plaintiff's evidence tended further to show that the defendant had actual notice that the plaintiff's agent, C. M. Hooper, did not have the express authority nor the apparent authority to make such payment,

and that it was without consideration, and that he did not ratify the payment of the attorneys' fee.

The trial court submitted the usual issue of debt to the jury, with instructions limiting the plaintiff's right to recover to the finding of the jury that the defendant must have had actual notice that plaintiff's agent did not have the authority to make the payment in excess of the interest and cost and principal of the note, with the appropriate instructions as to the burden of proof and their duty in the premises. The jury answered the issue as follows:

"In what amount, if any, is the defendant indebted to the plaintiff? Answer: $189.60, with interest from 27 October, 1920."

Defendant appealed to the Superior Court of Forsyth County, assigning errors, and from a judgment affirming the judgment of the county court, appealed to this Court.

Swink, Clement & Hutchins for plaintiff.
J. E. Alexander and L. M. Butler for defendant.

VARSER, J. The defendant's exceptions challenge instruction given to the jury in the county court as follows: "The principal is held to be liable on contracts duly made by his agent with a third person (1) when the agent acts within the scope of his actual authority; (2) when the contract, although unwise, has been ratified; (3) when the agent acts within the scope of his apparent authority, unless the third person has notice that the agent is exceeding his authority, the term "apparent authority," including the power to do whatever is usually done and necessary to be done, in order to carry into effect the particular power conferred upon the agent and to transact the business or to execute the commission which has been entrusted to him; and the principal cannot restrict his own liability for acts of his agent which are within the scope of his apparent authority by limitations thereon, of which the person dealing with his agent has no notice."

The foregoing is a correct statement of the law, clearly made, applicable to the facts in this case. The defendant has no basis for complaint at this instruction. When the verdict is interpreted in the light of this clear instruction, it appears that the jury has found that the defendant had actual knowledge that plaintiff's agent did not have the authority to make payment beyond the amount of the note, interest and costs in the suit on the note. These items were legal and just debts due by the plaintiff to the defendant bank. When plaintiff's agent paid the expense incurred by defendant in employing counsel, without authority, as the jury has found, upon defendant's request, this was clearly a receipt of money to the use of the plaintiff. *Bank v. McEwen,* 160 N. C.,

414; *Biggs v. Ins. Co.*, 88 N. C., 141; *Ferguson v. Mfg. Co.*, 118 N. C., 946; *Hall v. Presnell*, 157 N. C., 292; *R. R. v. Smitherman*, 178 N. C., 599; *Thompson v. Power Co.*, 154 N. C., 13; *Bank v. Hay*, 143 N. C., 326; *Wynn v. Grant*, 166 N. C., 39.

The facts in the instant record show a very little divergence between the contentions of the plaintiff and the defendant as to what happened with reference to the transaction out of which this suit arose. The defendant contends that it was a voluntary payment, with full knowledge of the facts, which cannot support this action to recover the money so paid. This is a correct principle as between the plaintiff and the defendant, when the facts support it. *Lambeth v. Power Co.*, 152 N. C., 371; *Beck v. Bank*, 161 N. C., 201; *Devereux v. Ins. Co.*, 98 N. C., 6; *Matthews v. Smith*, 67 N. C., 374; *Comrs. v. Comrs.*, 75 N. C., 240; *Pool v. Allen*, 29 N. C., 120; *Adams v. Reeves*, 68 N. C., 134; *Comrs. v. Setzer*, 70 N. C., 426; *Brummitt v. McGuire*, 107 N. C., 351. This transaction was had by plaintiff's agent and the defendant, and the jury finds that the defendant had actual notice that plaintiff's agent was without authority to make the payment in controversy. The law relating to voluntary payments by a party in person does not apply.

The defendant contends that plaintiff, after notice that his agent had made the payment, ratified the transaction and is therefore estopped to contend for a recovery of the same and moves in this Court to dismiss plaintiff's action, for that, the complaint does not set out sufficient facts to constitute a cause of action. Waiving plaintiff's contention that this motion is based upon the evidence and not upon the pleadings, we are of opinion that the doctrine of ratification does not apply. Plaintiff justly owed to the defendant bank $2,500 principal and $22.50 interest on his note held by the bank. A payment of this, after the bank had instituted suit, justly and properly entitled the bank to collect the actual court costs incurred in its suit on plaintiff's note, which was admittedly past due. There was ample consideration to support the payment of these items. That was the entire transaction authorized to be done by plaintiff's agent, according to the finding of the jury.

Immediately upon his finding out that the excess payment had been made, plaintiff goes to the defendant and demands a return of the excess payment, which is declined, and this suit is instituted to recover the same. The only part of the transaction that was open to this plaintiff to ratify, or not to ratify, was the payment of the excess above the items justly due the defendant. If he had attempted to disaffirm the payment of the amounts actually due, the defendant had the full right and ample power to refuse his demand. The items of the transaction are separable, although the entire payment was included in one

check to the defendant. The facts do not support the plea of ratification. The doctrine of ratification is clearly set forth in 21 R. C. L., 933; *Andrews v. Robertson,* 87 Am. St. Rep., 870; Mecham on Agency, sec. 167; *R. R. v. R. R.,* 147 N. C., 368; *Bank v. Justice,* 157 N. C., 373; *Bank v. Drug Co.,* 152 N. C., 142; *Christian v. Varborough,* 124 N. C., 72; *Rudasill v. Falls,* 92 N. C., 226; *Crawford v. Barkley,* 18 Ala., 270; *Hodnett v. Tatum,* 9 Ga., 270; *Bank v. Hanner,* 14 Mich., 208; *Coleman v. Itache,* 1 Oreg., 115; *Norwood v. Lassiter,* 132 N. C., 57; *McCullers v. Cheatham,* 163 N. C., 64.

Ratification is based upon the plain principle of honesty that a party cannot retain the benefits and escape the burdens of an act done by an unauthorized agent. In this case the plaintiff has retained no benefits. His paid note is not a benefit. It is evidence of payment when marked paid or surrendered to him. The consideration for payment of note and interest was the obligation already incurred by plaintiff to the bank, and the note evidenced this obligation, and the payment of the costs automatically ended the bank's right to proceed with the suit, consequently it was the law that fixed the rights of the parties upon the payment. The law raised an implied promise to repay the money received without consideration.

A benefit as applied to the case at bar, is some legal right, or thing of value, that the plaintiff accepted for the excess payment to which he was not otherwise entitled. *Harness v. Lumber Co.,* 17 Okla., 624; Page on Contracts (2 ed.), secs. 514, 515; Williston on Contracts, vol. I, sec. 102A. There must be a consideration to support the payment by the unauthorized agent in order to give the principal the opportunity to accept or ratify.

A valuable consideration in a legal sense, may consist of either a benefit to the promissor, or a detriment to the promisee. Page on Contracts, *supra;* Williston on Contracts, *supra.,* sec. 99, *et seq.; Cherokee County v. Meroney,* 173 N. C., 653; *Mfg. Co. v. McCormick,* 175 N. C., 277.

Usually the act or promise is a benefit to the one and a detriment to the other, and when it is of such nature it comes clearly within the definition of consideration. *Kirkman v. Hodgin,* 151 N. C., 588; *Bank v. Bridgers,* 98 N. C., 67; *Brown v. Ray,* 32 N. C., 72; *Reddick v. Jones,* 28 N. C., 107; Page on Contracts, *supra.*

The law implies a promise on the consideration, when valuable, in the same manner that equity presumes a resulting trust in favor of the party paying the purchase price (*Tire Co. v. Lester, ante,* 411), in order that every person may have his own. The law never implies a consideration where none exists in fact, but the promise to pay or to

repay, is often implied by the law to prevent an injustice. The payment of a debt due is no consideration that would support a new promise on the part of the defendant. Williston on Contracts, sec. 120; *Jones v. Coffey,* 109 N. C., 515; *Pruden v. R. R.,* 121 N. C., 509; *Ramsey v. Browder,* 136 N. C., 251.

When the excess payment was made as requested by defendant, there was no consideration and the law raised an implied promise to repay the same to plaintiff. The amount expended in counsel fees by defendant is not chargeable to plaintiff. C. S., 2983; *Finance Co. v. Hendry,* 189 N. C., 549. The motions to nonsuit were properly overruled for these reasons.

The exceptions to the exclusion of evidence cannot be reviewed here because the record does not disclose what the answers of the witnesses would have been. *Armfield v. R. R.,* 162 N. C., 24; *Gorham v. R. R.,* 158 N. C., 504; *Warren v. Susman,* 168 N. C., 457; *Hall v. Hall,* 179 N. C., 571. This is the established practice in this Court in civil and criminal cases. *Newbern v. Hinton, ante,* 108.

The defendant further excepted because its objection to evidence offered by plaintiff was overruled. The evidence was not prejudicial to the defendant. Plaintiff was not present when the payment was made, and the matter of counsel fees did not come up until he had left to go to his duty as a locomotive engineer and that precluded a request to him, personally, to pay this item.

The issue of debt submitted to the jury was sufficient. The test of the sufficiency of issues is, "did the issues afford the parties opportunity to introduce all pertinent evidence and apply it fairly?" *Tuttle v. Tuttle,* 146 N. C., 484; *Deloache v. Deloache,* 189 N. C., 394, 400; *Elliott v. Power Co., ante,* 62. When issues meet this test they satisfy all the requirements of *Rudasill v. Falls,* 92 N. C., 222, and *Gordon v. Collett,* 104 N. C., 381.

The question of voluntary payment by the plaintiff did not arise. The payment was made by plaintiff's agent, and the jury finds he was not unauthorized to make it, and that defendant's agent requested the payment. The defendant's request for instructions was fully met in the lucid and accurate charge by the learned judge of Forsyth County Court, and upon the whole record it is apparent that this cause was correctly tried, and the Superior Court committed no error in sustaining the judgment.

The judgment of the Superior Court of Forsyth County that there is no error in the trial of this case in the county court is

Affirmed.

LIBBY ALBRITTON, ADMINISTRATRIX OF LEO ALBRITTON, v. R. F. HILL.

(Filed 4 November, 1925.)

1. Negligence—Automobiles—Evidence—Statutes—Nonsuit.

It is negligence *per se* to drive an automobile upon a public highway at a speed greater than that permitted by statute, C. S., 2616, 2618, and where in an action to recover damages for the negligent killing of plaintiff's intestate, a voluntary passenger in the car thus driven, a motion as of nonsuit upon such evidence is properly denied.

2. Same—Passengers.

In an action to recover damages for the killing of plaintiff's intestate caused by the negligent driving of the defendant of his automobile in which the intestate was a passenger, concurring with the negligence of the Highway Commission in leaving a road it was having constructed at night without a light or other signal of danger, these allegations of the complaint distinctly made are sufficient to sustain an action against the driver of the automobile.

3. Same—Proximate Cause—Concurring Causes.

Where two proximate causes arising from negligence contribute to an injury, and one of them is attributable to the defendant in an action for damages for the negligent killing of plaintiff's intestate, the defendant is liable if his negligent act brought about one of these causes.

4. Same—Common Enterprise.

The negligent driving of the owner of the car or his agent, is not attributable to a passenger therein who has no authority over him or control over the car or the manner in which it was being driven at the time his injury was caused, the subject of his action for damages, nor will the principles of law applicable to those engaged in a common purpose apply from the fact that the injured party and the driver of the car were riding together to the same destination.

APPEAL by defendant from *Lyon, J.*, at February Special Term, 1925, of WAYNE.

A demurrer filed by the Wayne Highway Commission, formerly a party defendant, was sustained, and the action was prosecuted against the defendant Hill. The jury found that the plaintiff's intestate, was injured and killed by the negligence of the defendant, and assessed damages. Judgment for plaintiff; exception and appeal by defendant.

Sutton & Greene, D. H. Bland and Douglass & Douglass for plaintiff.
Langston, Allen & Taylor and Rouse & Rouse for defendant.

ADAMS, J. On 15 April, 1920, at 7 p. m., the defendant and five others, including the deceased, left Raleigh on their return to Kinston. They were traveling in a Winton car driven by the defendant, but according to his testimony owned by his wife. At a place on the highway

about nine miles west of Goldsboro the highway commission had removed a bridge for the purpose of constructing a culvert and had made a detour almost on a line with the public road. In the forenoon of the same day the defendant had driven the car over this detour on his trip to Raleigh. The plaintiff alleged that the defendant operated the car at a dangerous rate of speed and in a reckless, negligent and unlawful manner, and thereby caused it to bound off the highway, turn over and bring about the intestate's injury and death. With respect to the negligence of the highway commission, the plaintiff alleged that it had carelessly left the culvert open and unguarded, and had negligently failed to provide lights or other sufficient warning as to the condition of the road; and further that the unlawful conduct of both defendants, namely, the fast, reckless, dangerous, and unlawful speeding of the car by the defendant, and the negligence of the highway commission in leaving the culvert open and unguarded, was the efficient and proximate cause of the intestate's death. In his answer the defendant denied the material allegations of the complaint and alleged that the deceased at the time of the injury was a voluntary occupant of the car and was as fully informed as the defendant concerning the condition of the culvert, the speed of the car, and other attendant circumstances and uttered no word of warning, caution, or remonstrance; and that in this way the negligence of the deceased contributed to his injury and death.

The defendant first contends that his motion for nonsuit should have been allowed; but we have failed to discover any sufficient cause for dismissing the action. The statute in force at the time of the injury limited the speed of motor vehicles to twenty-five miles an hour (C. S., 2618); but there is evidence for the plaintiff, though contradicted by the defendant, that the defendant was running the car at a reckless rate of speed, one witness saying fifty and another seventy miles an hour, just before the injury occurred. This and other evidence, which we need not set out in detail (C. S., 2616), tended to show a breach of more than one statute. A breach of either is negligence *per se;* the causal relation between the alleged negligence and the injury, being, of course, a question for the jury. *Ledbetter v. English,* 166 N. C., 125; *McNeill v. R. R.,* 167 N. C., 390; *Clark v. Wright, ibid.,* 646; *Zagier v. Express Co.,* 171 N. C., 69; *Dunn v. R. R.,* 174 N. C., 254; *Ridge v. High Point,* 176 N. C., 421; *Newton v. Texas Co.,* 180 N. C., 561; *Graham v. Charlotte,* 186 N. C., 649.

We do not agree with the defendant in saying there is no allegation that the defendant's negligence was the proximate cause of the injury, for there are distinct allegations as to the defendant's negligent acts and as to those of the highway commission. In reference to concurrent negligence we have held that where two proximate causes con-

tribute to an injury, the defendant is liable if his negligent act brought about one of such causes. *Mangum v. R. R.*, 188 N. C., 689; *Hinnant v. Power Co.*, 187 N. C., 288; *White v. Realty Co.*, 182 N. C., 536; *Wood v. Public Corporation*, 174 N. C., 697; *Harton v. Telephone Co.*, 141 N. C., 455. We have also held that negligence on the part of the driver of a car will not ordinarily be imputed to another occupant unless such other occupant is the owner of the car or has some kind of control over the driver. See cases cited in the concurring opinion in *Williams v. R. R.*, 187 N. C., 355. To avoid the effect of this rule the defendant seeks to bring his case within the principle applicable to persons engaged in a joint enterprise. This position raises the direct question whether the deceased and the defendant had embarked upon a common purpose. If they had, the plaintiff would be precluded from recovering. In reference to the question Huddy says:

"In every case it may be said that the parties are engaged in the common enterprise of 'riding,' but that is not sufficient to bring the passenger within the rule. In such a case the passenger may be merely a guest of the driver and will not be charged with the negligence of the driver. The negligence of the driver will not be attributed to the passenger, unless the latter undertakes to or has the right to exercise some control over the movement of the vehicle. In order that there be such a joint undertaking, it is not sufficient merely that the passenger or occupant of the machine indicate to the driver or chauffeur the route he may wish to travel, or the places to which he wishes to go, even though in this respect there exists between them a common enterprise. The circumstances must be such as to show that the occupant and the driver together had such control and direction over the automobile as to be practically in the joint or common possession of it. Parties cannot be said to be engaged in a joint enterprise unless there is a community of interest in the objects or purposes of the undertaking, and an equal right to direct and govern the movement of each other with respect thereto. Each must have some voice and right to be held in its control and management." The Law of Automobiles, 893, and cases cited.

Berry, also, in his work on "Automobiles," after observing that the test in determining the question is whether the persons were jointly operating or controlling the movements of the vehicle, remarks:

"Some common purpose or interest is not to be inferred from the fact that two persons were riding in the same vehicle, one of them driving and managing the same, while the other occupied another seat, passively going wherever the driver saw fit to direct their course. Nor can it be inferred from the fact that the latter accepted the invitation of the former to ride as a matter of simple pleasure or outing.

Indeed, the fact that one invites and the other accepts a simple invitation of this kind, without suggestion of some common end to be accomplished by their united effort or agency, tends to negative any such relation." P. 503.

To the same effect is the discussion of the subject by Babbitt in The Law Applied to Motor Vehicles, sec. 1356 *et seq.*

After the examination of R. J. Dawson as a witness for the defendant, Mrs. J. H. Albritton was permitted to testify as to a conversation between herself and Dawson, in which he related the defendant's remark that the car was not registering more than fifty-five miles an hour some time before the injury occurred. So far as we can see the form of the question is unobjectionable and no motion was made to strike out the answer. We apprehend, however, that the conversation was not admitted as substantive evidence against the defendant, but as tending to contradict Dawson. He had previously testified as to the speed of the car and this evidence was admitted as a declaration made in Dawson's presence without his contradiction and with his implied acquiescence. If it had been admitted as substantive evidence against the defendant it would only have tended to show his disregard of the statutory limit as to speed; and the defendant himself testified that, while going down the hill, on which there are two curves, and while approaching an abrupt detour, he was traveling at the rate of twenty or twenty-five miles an hour. This was a breach of the statute then in force. C. S., 2616. This exception, therefore, cannot be sustained; and the other exceptions to evidence are obviously untenable and call for no discussion. What we have said disposes, also, of the exception to the Court's refusal to submit an issue as to contributory negligence and of exceptions eleven and twelve which are addressed to instructions in reference to the proximate cause of the injury and death. We find

No error.

NORTH CAROLINA SCHOOL BOOK DEPOSITORY, INC., v. C. B. RIDDLE AND P. D. TEAGUE.

(Filed 4 November, 1925.)

1. Issues—Pleadings—Evidence.

Issues must arise from both the pleadings and the evidence properly admitted on the trial.

2. Contracts—Principal and Surety — Admissions—Issues—Instructions.

The plaintiff School Book Depository, under a contract with the principal defendant supplied school books to be sold on commission and ac-

counting for sale, and upon the unsatisfactory dealing of defendant thereunder, refused to send more books, but afterwards did so upon the defendant's furnishing a bond with surety for his faithful performance of his contract. The defendant surety denied liability, acknowledged that he signed the bond, admitted the liability of his codefendant for its breach, and the amount of damages claimed, but testified he signed the bond under a mistake as to its purpose, without sufficient allegation or evidence of fraud in the *factum* or in the treaty. *Held*, an instruction was proper in effect, that if the defendant surety signed the bond to answer the issue as to defendant's liability in plaintiff's favor.

3. Pleadings—Answer — Personal Transactions—Denials—Issues—Statutes.

In an action to recover upon an indemnity bond an allegation of the complaint that defendant signed as surety, is one of a personal transaction, and answer that defendant signed some paper, but has no information or belief as to whether the instrument sued on was the one he signed, is insufficient to raise the issue under the provisions of our statute, C. S., 519, 543, 582.

APPEAL by defendant, P. D. Teague, from *Calvert, J.*, at June Term, 1925, of ALAMANCE.

Action to recover upon bond executed by defendant, C. B. Riddle, as principal, and defendant, P. D. Teague, as surety. From judgment in favor of plaintiff, defendant P. D. Teague appealed to the Supreme Court.

Coulter & Cooper for plaintiff.
Thos. C. Carter for defendant.

CONNOR, J. On 30 January, 1923, plaintiff, whose place of business is in Raleigh, N. C., entered into a contract in writing with defendant, C. B. Riddle, by which plaintiff agreed to ship to defendant at Burlington, N. C., a sufficient number of the text-books adopted by the State Text-Book Commission to supply the demands of the schools in the vicinity of Burlington. Defendant Riddle agreed to receive said books, as agent for plaintiff, to sell and dispose of them for cash, for and on account of plaintiff, and on or before the 5th day of each month, next succeeding the date of the sales, during the school year from 1 September to 1 June, to pay over to the plaintiff, as principal at Raleigh, N. C., all moneys collected from said sales.

During the spring of 1923, plaintiff shipped books to said defendant, under said contract; defendant's settlements were not satisfactory to plaintiff and in May, 1923, plaintiff ceased to ship books to said Riddle. On or about 4 September, 1923, defendant C. B. Riddle sent to plaintiff, through the mail, a bond signed by himself as prin-

cipal and P. D. Teague, as surety. This bond was in the penal sum of $5,000, and was conditioned as follows:

"Whereas, said principal has entered into a certain written agreement with said North Carolina School Book Depository, Incorporated, dated 30 January, 1923, a copy of which is hereto attached, and made a part hereof,

Now, therefore, the condition of the foregoing obligation is such that if the said principal shall well and truly indemnify and save harmless the said North Carolina School Book Depository, Inc., from any pecuniary loss resulting from the breach of any of the terms, covenants and conditions of the said contract on the part of the said principal to be performed, then this obligation to be void, otherwise to remain in full force and effect in law.

In testimony whereof, the said principal and said sureties have hereunto set their hands and seals, this the 4th day of September, 1923.

(Signed) P. D. TEAGUE (Seal)
(Signed) C. B. RIDDLE (Seal)

Witness:
(Signed) W. L. CATES."

After the receipt of said bond, plaintiff shipped to defendant Riddle at Burlington, N. C., during the month of September, school books, under the contract, dated 30 January, 1923, and referred to in said bond. Said defendant sold said books and from time to time remitted to plaintiff, on account of the proceeds of said sale. On 11 December, 1923, said defendant had failed to account fully with plaintiff for said books. The amount due by said defendant to plaintiff, on account of sales of said books on said date was $4,619.29, with interest from 1 December, 1923.

On 18 January, 1924, plaintiff, through its attorney, made demand upon defendant, P. D. Teague, surety on said bond, dated 4 September, 1923, for settlement of the balance due by Riddle. Upon failure of both Riddle and Teague to pay said balance due, this action was commenced on 8 February, 1924.

Defendant, P. D. Teague, in his answer to the complaint, admitted that he "signed a paper-writing concerning the handling of books, but says that he did not write the same and was informed by C. B. Riddle and W. Luther Cates, a notary public, that he was signing a paper as a stockholder of Burlington Printing Company to enable it to continue business and that it would only affect his interest in said Burlington Printing Company; that he is informed and believes and so alleges that the said W. Luther Cates was representing the plaintiff in this matter and that he was deliberately deceived in signing a paper-

writing. Whether or not this is the same paper-writing referred to in Article 3 he has no information or belief."

The issues tendered by defendant do not arise upon the pleadings; no evidence was offered relevant to these issues. There was no error in the refusal of the court to submit them to the jury. The issue submitted by the court, to wit: "Did defendant, P. D. Teague, execute bond set out in the complaint," was the proper issue to determine the liability of defendant. The breach of the contract by C. B. Riddle, and the amount due by him to plaintiff were admitted by defendant, Teague, during the progress of the trial.

W. Luther Cates, a notary public, testified for plaintiff that in September, 1923, at the request of C. B. Riddle, he went with him to the home of defendant, P. D. Teague; that witness stopped at the house and Riddle went to the store, some distance from the house; Teague and Riddle came out from the store, stopped in the yard and had a conversation which witness did not hear; that at the time Riddle had the paper in his hand; that when Riddle and Teague came back together to witness, Riddle handed witness the paper; that witness did not read the paper, nor did he see Teague read it; that Teague signed the paper, and in response to witness' question, acknowledged the execution of the same by him. Teague swore he was worth $8,000. After Riddle had signed the paper, and witness had signed his name as witness to the execution of same by both Riddle and Teague, he delivered the paper to Riddle. Witness testified that he had no interest in the transaction other than as notary public.

A. E. Lewis testified that he was during 1923 and is now manager of plaintiff; that the paper-writing referred to in the complaint, copy of which is attached thereto as Exhibit B, was sent through the mail to C. B. Riddle, at Burlington, N. C., that it was returned through the mail, with the signatures of both defendants affixed thereto. After the receipt of the paper, signed by defendants, plaintiff shipped books to C. B. Riddle, under the contract dated 30 January, 1923; no books would have been shipped to him, if plaintiff had not received the bond executed by defendants.

P. D. Teague, defendant, testified that Riddle and Cates came to his home in the southern part of Alamance County; that he signed a paper which they had; that he did not read it; that they might have read part of it to him. Witness did not receive any notice from the North Carolina School Book Depository, Inc., that it held a bond signed by him; that Mr. Coulter, attorney for plaintiff, wrote him, advising that Riddle had failed to account for books shipped to him by plaintiff, and demanding that witness settle same, as surety for Riddle. Witness testified that the signature on the paper shown him

was his signature; that he signed the paper. Witness denied that he had told any one that he was worth $8,000.

The court instructed the jury that if they found the facts to be as shown by the evidence, they would answer the first issue "Yes." Assignment of error based upon exception to this instruction cannot be sustained.

In its complaint, plaintiff alleged that on or about 4 September, 1923, defendant Teague "gave the plaintiff a bond in the sum of $5,000," copy of which was attached to the complaint. This is an allegation of a personal transaction by defendant and, if controverted by defendant, called for a specific denial. In his answer, defendant admits that "he signed a paper-writing concerning the handling of books," but says that "he has no information or belief as to whether the paper which he signed is the paper referred to in the complaint." This is not a general or specific denial of a material allegation of the complaint. Nor is it a denial of any knowledge or information thereof sufficient to form a belief. C. S., 519. A material allegation of the complaint, not controverted by the answer is, for the purposes of the action, taken as true. C. S., 543. An issue of fact arises upon a material allegation in the complaint controverted by the answer. C. S., 582. Where there is an allegation in the complaint of a personal transaction by the defendant, a denial by defendant, in his answer, of information or belief, as to the truth of the allegation is not sufficient to raise an issue. *Streator v. Streator,* 145 N. C., 337; *Avery v. Stewart,* 136 N. C., 426. There is no sufficient allegation in the answer of fraud in the treaty or fraud in the *factum* to support a defense to the paper-writing which defendant admits he signed. Nor is there any allegation that defendant did not read the paper which he signed, or that he was fraudulently prevented from reading it. *Colt v. Kimball, ante,* 169. However, if an issue had been properly raised by the pleadings, the evidence is all to the effect that defendant executed the bond, upon which plaintiff seeks to hold him liable in this action.

We have considered assignments of error based upon the court's refusal to give special instructions as prayed for by defendant. These instructions are predicated upon principles of law which have no application to this action. The assignments of error cannot be sustained. There was no error in the rulings of the court upon objections to the admission or exclusion of evidence.

The judgment must be affirmed. There is

No error.

HYDE COUNTY LAND & LUMBER COMPANY v. THOMASVILLE CHAIR COMPANY.

(Filed 4 November, 1925.)

Judgments—Motions to Set Aside Judgments—Surprise and Excusable Neglect—Attorney and Client—Statutes.

A judgment will not be set aside for irregularity and surprise when it appears that it had come to issue and was regularly set upon the trial docket, and judgment entered in the due course and practice of the court, the only grounds upon which relief is sought being the employment of nonresident local attorneys, who were not notified though means of easy communication in ample time was available, the neglect of the attorneys being personally attributable to the party to the action, whose duty it was also to attend to the action himself, as well as to employ attorneys for the purpose. C. S., 600.

APPEAL from HYDE Superior Court. *Calvert, J.*

Motion by defendant to set aside judgment for irregularity, and under C. S., 600, for surprise. Affirmed.

S. S. Mann for plaintiff.

Raper & Raper and H. R. Kyser for defendant.

VARSER, J. This motion to set aside the judgment was upon two grounds, irregularity and surprise. The facts are as follows:

Summons issued from Hyde Superior Court 11 April, 1925, returnable 27 April, 1925, and served, with copy of complaint, 16 April, 1925. Answer filed 6 May, 1925, and plaintiff's reply filed 16 May, 1925. The next term of Hyde Superior Court convened 18 May, 1925. Plaintiff's reply denied the defendant's allegation of payment and discharge of indebtedness which constituted plaintiff's cause of action. The cause was called for trial 22 May, 1925, and the issues raised by the pleadings were submitted to a jury and the verdict rendered in favor of the plaintiff in the sum of $474.45, with interest from 19 May, 1922, and judgment in regular form rendered for this amount, with costs.

It further appears that plaintiff is a corporation operating in North Carolina with "domicile" in the county of Hyde. Defendant corporation is a North Carolina corporation, resident in Davidson County, North Carolina, and that defendant employed counsel resident in Davidson County, practicing there and in adjoining counties, where it is the custom to make out civil calendars, which custom prevails in Hyde County, but no calendar was made for the last two terms, a memorandum of the cases being prepared by the clerk for information. The Court further finds that more than 10 days elapsed from the filing

of the defendant's answer which raised the issues, the reply of plaintiff not being required, and that United States mails are delivered from Belhaven to the county seat of Hyde County every day except Sunday, and there is a telegraph station at Belhaven, N. C., with long-distance telephone communication between Belhaven and Swan Quarter, N. C., and that telegraphic messages are transmitted to Swan Quarter, N. C., by telephone; that there are other lawyers residing at Swan Quarter, N. C., than plaintiff's counsel, and that the State Highway from Belhaven to Swan Quarter was in passable condition and that the defendant's agents and attorneys could have reached Swan Quarter between 6 May, 1925, and 18 May, 1925, and that communication could have been had by defendant with county officials and counsel in Hyde County within this time.

There is no irregularity whatever in this case, and unless the defendant's negligence is excusable there is no relief. As well said in *Pepper v. Clegg,* 132 N. C., 312: "A lawsuit is a serious matter and parties must give it that attention which a prudent man gives to his important business." *Sluder v. Rollins,* 76 N. C., 271; *Roberts v. Allman,* 106 N. C., 391, and that the employment of counsel does not excuse the client from giving proper attention to the case. *McLean v. McLean,* 84 N. C., 366; *Vick v. Baker,* 122 N. C., 98; *Norton v. McLaurin,* 125 N. C., 185; *Manning v. R. R.,* 122 N. C., 824, 831. This latter case does not approve of "attending to legal proceedings at long range." *Chief Justice Clark,* in *Pepper v. Clegg, supra,* expressed much wisdom when he said: "When a man has a case in court the best thing he can do is to attend to it."

In these motions the Court cannot lose sight of the rights of the party who has been diligent and has sought his remedy according to the course and practice of the Court. If there is hardship as between the parties, it must be borne by him who was not diligent, unless the facts come within the purview of C. S., 600. The facts in the instant case are not sufficient to afford relief. The judgment appealed from is

Affirmed.

J. P. TEMPLE v. SOUTHERN RAILWAY COMPANY AND JAMES C. DAVIS, DIRECTOR.

(Filed 4 November, 1925.)

1. Carriers of Goods—Railroads — Freight Charges—Sales—Proceeds—Actions—Evidence.

Where a shipment of hay has been sold by a railroad company shipped under an order notify bill of lading, for the payment of freight charges,

the owner of the legal title is entitled to the excess amount the shipment has brought at the sale, and the market value at the time of the sale is evidence of the amount the hay brought thereat.

2. Same — Bills of Lading — Order Notify — Endorsements — Title — Actions—Parties—Negotiable Instruments.

Where an order notify bill of lading has been endorsed by the shipper, it is negotiable, and the holder may maintain his action thereon. C. S., 290.

3. Same—Stipulations—Conditions.

In an action to recover of a railroad company the balance of the proceeds of sale of a carload of hay, over the amount necessary to pay carriage charges, the provision in the bill of lading requiring written notice within four months for claim for damages, etc., is inapplicable.

APPEAL by defendants from *Dunn, J.*, at April Term, 1925, of NEW HANOVER. No error.

Facts as alleged in the complaint are as follows: On 5 March, 1918, bill of lading was issued by Grand Trunk Railway, at St. Lamberts, Quebec, Canada, for carload of hay, to be shipped to Macon, Ga., and there to be delivered to order of Wm. C. Bloomingdale, shipper, notify J. P. Temple. This bill of lading was transferred and assigned by endorsement of Wm. C. Bloomingdale to the Canadian Bank of Commerce, as security for his indebtedness to said bank.

Upon arrival of the car of hay at Macon, Ga., on 23 April, 1918, the agent of defendants notified J. P. Temple, and demanded of him payment of freight, at the rate of 55.2 cents per hundred. Temple refused to pay the freight at this rate for the reason that same was in excess of the lawful rate. The agent refused to deliver the hay to either J. P. Temple or the Canadian Bank of Commerce, upon offer to pay freight at the lawful rate. Defendants thereafter sold the hay, and retained in their possession the proceeds of the sale, contending that the amount received at said sale was not sufficient to pay the freight, demurrage, and other lawful charges.

Plaintiff is now the owner of the bill of lading, having acquired all the right, title and interest of the Canadian Bank of Commerce, by sale, transfer and assignment, on 25 October, 1918, and of Wm. C. Bloomingdale, by sale pursuant to an order of the bankrupt court of Canada on 7 April, 1919, Bloomingdale having been adjudged a bankrupt, after the issuance of the bill of lading. This action was commenced on 15 August, 1919.

Defendants, in their answer, deny the facts as alleged in the complaint, and for a further defense aver that no claim was made on account of said hay, in writing, within four months after a reasonable time for the delivery of same, as provided in section 4 of the bill of lading. Defendants plead failure to comply with said provision in bar of this action.

On the trial, plaintiff offered evidence tending to sustain the allegations of the complaint; defendants did not offer evidence.

The issues submitted by the court were answered in accordance with the contentions of plaintiff. Upon the verdict, judgment was rendered that plaintiff recover of defendants the sum of $403.23 with interest on $285.98 from 23 April, 1918, and the costs of the action to be taxed by the clerk. From this judgment, defendants appealed.

Herbert McClammy for plaintiff.
John D. Bellamy & Sons for defendants.

CONNOR, J. The bill of lading, providing for the delivery of the hay to the order of Wm. C. Bloomingdale, the shipper, at Macon, Ga., with the name of the shipper written on the back thereof, was offered in evidence by plaintiff. There was evidence that the name of the shipper, endorsed on the bill of lading, was in his handwriting. It is an order bill of lading and, therefore, negotiable by endorsement. U. S. Comp. Stat. 8604-b. Its negotiability is not affected by the provision that J. P. Temple be notified of the arrival of the hay at destination. U. S. Comp. Stat., 8604-d. Possession of the bill of lading by the plaintiff, with the endorsement of the shipper, is evidence of plaintiff's ownership of the hay, and of his right to the proceeds of the sale of the same. *Mangum v. Grain Co.*, 184 N. C., 181; *Watts v. R. R.*, 183 N. C., 12; U. S. Comp. Stat., 8604-m, 8604-mm; C. S., 307, 308. No further evidence of the sale, transfer or assignment of the bill of lading by either the Canadian Bank of Commerce, or Wm. C. Bloomingdale, or the curators of his estate in bankruptcy, was necessary. Upon the issue in this case, it is immaterial whether there was other evidence of the sale, transfer or assignment of the bill of lading or not. *Holloman v. R. R.*, 172 N. C., 372. The order bill of lading, endorsed by the shipper, in the possession of plaintiff was sufficient evidence of plaintiff's ownership of the bill of lading and of the hay for which the bill of lading was issued. U. S. Comp. Stat., 8604-dd; C. S., 290. The assignment of error based upon defendants' contention that there was no evidence that plaintiff was owner of bill of lading for the hay, cannot be sustained. 10 C. J., 204.

This is not an action to recover for loss or damage to the hay, nor for delay in transporting or delivering same. Plaintiff seeks to recover the value of the hay at destination, on day of arrival of car. Defendants having sold the hay, to enforce its lien for freight and other lawful charges (U. S. Comp. Stat., 8604-m) is liable to the owner for the balance of the proceeds of the sale. There is no evidence of any sum due defendants except that for freight at the rate of 44 cents per

hundred. There is evidence of the market value of the hay at Macon, Ga., on 23 April, 1918. There is no evidence of the amount received by defendants from sale of the hay. Under the instructions of the court the jury has found that plaintiff is entitled to recover of defendants the sum of $285.98, with interest from 23 April, 1918, and judgment is rendered for this amount. This judgment is affirmed. The assignment of error based upon exception to the instruction of the court to the jury that this action is not barred by failure to file claim in writing within four months as provided in section 4 of the bill of lading is not sustained. *Anthony v. Express Co.*, 188 N. C., 407. We find

No error.

LILLIAN HARKRADER v. W. F. LAWRENCE.

(Filed 4 November, 1925.)

1. Quo Warranto—Public Office—Elections—Courts—Jurisdiction.

Quo warranto or an information in the nature of *quo warranto* is the procedure to try the title to a public office between rival claimants thereto, when one is in possession thereof under a claim of right and in the exercise of its official functions, or the performance of its official duties, and is within the jurisdiction of the Superior Court, which is not ousted by declaration of the board of canvassers as to the result of the election or the issuance of a certificate of election.

2. Elections—Public Office—Statutes—Results—Judicial Acts—Quo Warranto—Court's Jurisdiction.

The act of the county canvassers in declaring the result of an election to public office, C. S., 5986, cannot have the effect of ousting the jurisdiction of the Superior Court in *quo warranto* or information in the nature thereof.

3. Same—Appeal and Error—Objections and Exceptions.

Objection to the counting of ballots and for a ruling thereon by the registrar and judges of election, to a public office, is not a condition precedent to the maintenance of *quo warranto*, etc., in the Superior Court.

APPEAL by defendant from the Superior Court of Surry County, *Schenck, J.* Affirmed.

E. C. Bivens and Swink, Clement & Hutchins for plaintiff.
Folger & Folger for defendant.

ADAMS, J. The plaintiff brought this action to try the title to the office of register of deeds of Surry County. She alleges that at an election held in November, 1924, she was duly elected to the office, and

that the board of county commissioners unlawfully issued the certificate of election to the defendant, who was thereafter unlawfully inducted into the office. She specifically alleges that in Rockford Township she received 186 votes and that for defendant 211 votes were counted, though he received only 200; that in Marsh Township seven votes were received after the polls had been closed, six of which were counted for the defendant; that 4,674 votes were cast for her in the election and for the defendant 4,664, although the board of commissioners had returned for the defendant a total of 4,681; that some of those who cast their ballots for the defendant were not qualified voters; were not residents of the precinct in which they voted or even of the State; or were not registered, or were absentee voters who had not complied with the law; and that the ballots of others qualified to vote were rejected and omitted from the count.

The defendant demurred to the complaint on three grounds: (1) The Superior Court had no jurisdiction of the action because the plaintiff alleges that the board of county canvassers declared the defendant elected and issued to him a certificate of election. (2) The county canvassers judicially determined the result of the election and finally passed upon all the matters in controversy and the plaintiff seeks to have the court review and overrule the action of the county board. (3) The plaintiff failed to object before the board of canvassers to the votes cast in the several precincts as provided by the Australian ballot which is applicable to Surry County. Laws Ex. Ses. 1924, ch. 37.

The defendant excepted to the judgment overruling the demurrer, and this exception presents his only assignment of error.

We do not perceive any valid reason for reversing the judgment. The cause first assigned by the defendant is obviously insufficient. Neither the declaration of the board of county canvassers as to the result of the election nor the issuance of a certificate of election can deprive the Superior Court of its jurisdiction to inquire into the regularity of the election and to determine whether the law has been observed or disregarded. One of the chief purposes of *quo warranto* or an information in the nature of *quo warranto* is to try the title to an office. This is the method prescribed for settling a controversy between rival claimants when one is in possession of the office under a claim of right and in the exercise of official functions or the performance of official duties; and the jurisdiction of the Superior Court in this behalf has never been abdicated in favor of the board of county canvassers or other officers of an election. *Rhodes v. Love,* 153 N. C., 469; *Johnston v. Board of Elections,* 172 N. C., 162, 167.

The second ground of demurrer is equally untenable. The county canvassers do not judicially determine the result of the election in the

sense of depriving the Superior Court of its jurisdiction. C. S., 5986. Under the statute they judicially determine the returns, stating the number of legal ballots cast for each officer, the names, and the number of votes. Whether section 5986 applies to the act of 1924, *supra*, need not be considered, for if it does the question has already been determined against the defendant's position. *Barnett v. Midgett*, 151 N. C., 1. The third cause of demurrer likewise is inadequate. Section 23 of the act of 1924, provides for making objection to the counting of any ballot and for a ruling thereon by the registrar and judges; but such objection by the plaintiff is not a condition precedent to the maintenance of an action in the Superior Court to test the legality of the election or to try the incumbent's title to the office he holds. Such a construction of the statute would serve as a means of promoting rather than preventing fatal irregularities or fraud in elections.

The judgment of the Superior Court is

Affirmed.

STATE v. JOHN WESLEY DAWKINS.

(Filed 4 November, 1925.)

Appeal and Error—Rules of Court—Motion to Affirm Judgment—Record Proper—Certiorari.

Upon motion of the Attorney-General when the case is regularly called for argument, on an appeal by defendant, the judgment of the Superior Court will be affirmed when the rules of practice relating to appeals have not been complied with, no motion for a *certiorari* has been made by the appealing defendant, and from an inspection of the record proper, it does not appear that error has been committed on the trial.

APPEAL by defendant from *Shaw, J.*, at June Special Term, 1925, of FORSYTH.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

No counsel for defendant.

STACY, C. J. It appears from an inspection of the record now before the Court that Ernest Key and John Wesley Dawkins were tried jointly and both convicted of murder in the first degree at the June Special Term, 1925, of the Superior Court of Forsyth County, and from the statutory judgment of death entered on such conviction, the defendant John Wesley Dawkins appealed.

Nothing but the record proper has been filed in this Court. No case on appeal has been sent up and no application has been made for a *certiorari* to have the same brought before the Court for review. The appeal has apparently been abandoned. The defendant has lost every right to have his case heard. It should have been ready for argument at the present term upon the call of the docket from the Eleventh District, to which it belongs. *S. v. Farmer,* 188 N. C., 243; *Finch v. Comrs., ante,* 154.

As the defendant has failed to prosecute his appeal, and no error is made to appear from an examination of the record proper, we must affirm the judgment on motion of the Attorney-General. *Comrs. v. Dickson, ante,* 330, and cases there cited.

Affirmed.

GEORGE L. WIMBERLEY, JR., ADMR., v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 12 November, 1925.)

1. **Employer and Employee—Master and Servant—Commerce—Railroads—Federal Statutes.**

In an action to recover damages for the alleged negligent killing of plaintiff's intestate, where it is admitted by the pleadings that the defendant was a common carrier by railroad, and engaged in interstate commerce at the time of the killing, and the intestate was employed by the defendant in such commerce, the defendant's liability is determinable under the Federal Statute.

2. **Evidence—Nonsuit.**

Upon defendant's motion as of nonsuit, the evidence is to be considered in the light most favorable to the plaintiff.

3. **Employer and Employee—Master and Servant—Negligence—Commerce—Federal Employers' Liability Act—Evidence—Nonsuit.**

Where there is evidence that the plaintiff's intestate was employed, as a part of his duty to a railroad company, to throw the switches to pass the trains from the main line to a siding for the passage of another train, under the custom of slowing down the train before reaching the switch, the passing of the switchman along the side of the locomotive, jumping from the pilot of the engine to the ground, running ahead and opening the switch to allow the passing of the train without stopping; that at the time in question the pilot was covered with frost and particularly dangerous for this purpose, and that the plaintiff's intestate fell to his death under the implied order of the engineer, the defendant's vice-principal, at a time when the engine made a sudden jerk or movement: *Held,* upon a motion by defendant as of nonsuit, the evidence was sufficient to warrant the jury in finding that the plaintiff's intestate was negligently permitted or directed to act as he did, and to deny said motion, and permit the inference of defendant's actionable negligence.

4. Same—Assumption of Risks.

The doctrine of assumption of risks has no application to cases arising when the negligence of a fellow-servant or coemployee, which the injured party could not have foreseen or expected, is the sole, direct and immediate cause of the injury.

5. Evidence—Conflicting Evidence of Plaintiff—Nonsuit.

The defendant's motion as of nonsuit will be denied, though from a part of the plaintiff's evidence no cause of action has been shown, if other of his evidence is sufficient to sustain his cause.

APPEAL by defendant from *Sinclair, J.*, at April Term, 1925, of NASH.

Civil action arising under the Federal Employers' Liability Act, and tried upon the following issues:

"1. Was the plaintiff's intestate killed by the negligence of the defendant as alleged in the complaint? Answer: Yes.

"2. Did the plaintiff's intestate, by his own negligence, contribute to his injury? Answer: No.

"3. Did the plaintiff's intestate voluntarily assume the risk incident to performing the work in the manner in which he undertook to do it? Answer: No.

"4. What damages, if any, is plaintiff entitled to recover? Answer: $15,000.00.

"5. What part of the recovery, if any, is the widow entitled to? Answer: $5,000.00.

"6. What part, if any, is the son entitled to? Answer: $10,000.00."

From a judgment on the verdict in favor of plaintiff, the defendant appeals, assigning errors.

Jos. B. Ramsey and John Kerr, Jr., for plaintiff.

Thos. W. Davis, V. E. Phelps and Spruill & Spruill for defendant.

STACY, C. J. It is alleged in the complaint and admitted by the answer that the defendant is a common carrier by railroad, engaged in interstate commerce, and that plaintiff's intestate was employed by the defendant in such commerce at the time of his injury and death. The case, therefore, is one arising under the Federal Employers' Liability Act, and it has properly been tried under that act. *Shanks v. Del. R. Co.*, 239 U. S., 556; *Capps v. R. R.*, 183 N. C., 181. The deceased employee left a widow and one small son him surviving, and his administrator, or personal representative, is prosecuting this suit on behalf of these persons, who fall in the first class of beneficiaries under the statute. *Horton v. R. R.*, 175 N. C., 472; *Dooley v. R. R.*, 163 N. C., p. 463.

The defendant's chief assignment of error, or the one most strongly urged on the argument and in its brief, is the exception addressed to the

refusal of the court to grant its motion for judgment as of nonsuit, made as permitted by C. S., 567, at the close of plaintiff's evidence. There was no evidence offered by the defendant. With reference to the rule of procedure applicable, authorized by statute in this jurisdiction, it is uniformly held that on a motion for involuntary nonsuit, considered with us as equivalent to a demurrer to the evidence, the facts making for the plaintiff's claim and which tend to support his cause of action, must be taken as true and construed in the light most favorable to him. *Nash v. Royster,* 189 N. C., p. 410; *Lamb v. R. R.,* 179 N. C., p. 623.

Viewing the evidence under this rule and in its most favorable light for the plaintiff, we find the following facts sufficiently established, or as reasonable inferences to be deduced from the testimony of the witnesses:

1. Plaintiff's intestate, R. C. Murray, was killed about 4:00 a. m., 21 January, 1921, while in the discharge of his duties as brakeman on the defendant's northbound freight train, No. 212, composed of a Pacific-type engine, No. 1558, tender and 75 cars, as it approached Rennert's Siding, approximately 20 miles south of Fayetteville, N. C., on an interstate run from Florence, S. C., to points as far north as Rocky Mount, N. C.

2. The freight train in question was running on a "time order," ahead of No. 86, one of the defendant's fast passenger trains, and the engineer of the freight train, with only "running time and clearance time" and probably a few minutes to spare, was preparing to take the spur track at Rennert's Siding, so that No. 86 might pass at this point.

3. It was the duty of plaintiff's intestate to throw the switch in order that the freight train might clear the track for the oncoming passenger train.

4. Plaintiff's intestate was riding on the engine with the engineer; he knew of the order to clear the main line for No. 86, and the time within which the rules of the company required this to be done; he said to the engineer as they came within a mile and a half or more of Rennert's Siding, "When we get there I will go out and set the switch so you will not have to stop," to which the engineer replied, "Well, I will appreciate it." This was equivalent to an order from the engineer to throw the switch.

5. Plaintiff's intestate left the cab of the engine, from the fireman's side, walked along the narrow foot board about 14 inches wide, leading from the cab to the pilot of the engine and which is provided for going along that way and is protected by a small hand rail, but he fell and was killed by the train before it reached the switch.

6. At the time plaintiff's intestate left the cab to go out over the engine and across the pilot, the train was running at a rate of 15 or 18 miles an hour and was about a quarter of a mile from Rennert's Siding. He expected to jump from the pilot to the ground, run ahead of the moving train and open the switch so that it could take the siding without coming to a full stop. This was the customary method of throwing switches for these trains, and the officials of the company knew of its practice, but the evidence is conflicting as to whether such practice was in violation of the rules of the company.

7. There was evidence from which the jury could infer that after plaintiff's intestate left the cab of the engine, the speed of the train was reduced from 18 miles per hour to 5 miles per hour within a comparatively short distance; and from this circumstance plaintiff contended that his intestate fell from the engine by reason of a sudden jerk or jolt, though there was direct evidence in denial of any unusual jar of the train.

8. It was further in evidence that the pilot of the engine was in a damp, frosty condition and the night dark and pretty cold.

Upon these the facts chiefly pertinent and bearing directly on the question of the defendant's liability, we think the trial court correctly submitted the case to the jury, and that the motion for judgment as of nonsuit was properly overruled. There is ample evidence to warrant the jury in finding, as it did, that plaintiff's intestate was negligently permitted and directed to leave the train under conditions that were not safe, and that he was negligently precipitated from the engine, which resulted in his death. *New Orleans, etc., R. R. v. Harris, Admr.*, 247 U. S., 367; *Sweeney v. Erving*, 228 U. S., 233; *Looney v. R. R.*, 200 U. S., 480; *Ridge v. R. R.*, 167 N. C., 510.

Speaking to a similar question in *Fitzgerald v. R. R.*, 141 N. C., p. 534, *Hoke, J.*, said: "It is very generally held that direct evidence of negligence is not required, but the same may be inferred from facts and attendant circumstances, and it is well established that if the facts proved establish the more reasonable probability that the defendant has been guilty of actionable negligence, the case cannot be withdrawn from the jury, though the possibility of accident may arise on the evidence," citing authorities for the position.

The defendant may have elicited on cross-examination, evidence somewhat contradictory to that above detailed, but this only affected the credibility of the witnesses and did not destroy their testimony. *Christman v. Hilliard*, 167 N. C., 4.

Animadverting on a similar situation in *Shell v. Roseman*, 155 N. C., p. 94, *Allen, J.*, said: "We are not inadvertent to the fact that the plaintiff made a statement on cross-examination as to a material matter,

apparently in conflict with his evidence when examined in chief, but this affected his credibility only, and did not justify withdrawing his evidence from the jury. *Ward v. Mfg. Co.,* 123 N. C., 252."

Again it is the accepted position with respect to cases arising under the Federal Employers' Liability Act that the doctrine of assumption of risk has no application when the negligence of a fellow-servant or co-employee, which the injured party could not have foreseen or expected, is the sole, direct and immediate cause of the injury. *Seaboard R. R. Co. v. Horton,* 233, U. S., 492; *Cobia v. R. R.,* 188 N. C., 487; *Bass v. R. R.,* 183 N. C., 444.

In *Reed v. Director General of Railroads,* 258 U. S., 92, 66 L. Ed., 480, a caboose of an interstate train was being moved in front of a locomotive through the railroad yards at South Bethlehem, Pa., and over tracks equipped with derailing devices; the engineer could not see these devices when operating the engine from his cab, and, for this reason, Leo C. Reed, a member of the train crew, was directed to and did locate himself on the front of the caboose, with the duty to signal the engineer in time for him to stop, if it should be discovered that one of the derailing devices was set against further passage. One was so set, but, either through the negligence of Reed himself, or of the engineer in failing to notice or heed his signaling, the locomotive did not stop with safety, the caboose was derailed, and Reed was crushed to death between it and cars on an adjoining track. Accepting the view that the engineer's negligence was the proximate cause of the fatal injury, the Supreme Court of Pennsylvania held the decedent had assumed the risk of such negligence and the master was not liable. This was reversed on *certiorari* by the Supreme Court of the United States, and in delivering the opinion of the Court, *Mr. Justice McReynolds,* said:

"In actions under the Federal act, the doctrine of assumption of risk certainly has no application when the negligence of a fellow-servant, which the injured party could not have foreseen or expected, is the sole, direct, and immediate cause of the injury. To hold otherwise would conflict with the declaration of Congress that every common carrier by railroad, while engaged in interstate commerce, shall be liable to the personal representative of any employee killed while employed therein, when death results from the negligence of any of the officers, agents, or employees of such carriers."

The remaining exceptions are without substantial merit; they have all been covered by former adjudications. We have examined the authorities cited in the defendant's carefully prepared brief, but find that they are easily distinguishable from the case at bar by reason of the peculiar facts here presented. Viewing the record in its entirety, we think the verdict and judgment should be upheld.

No error.

VANCE FLEMING AND MRS. VANCE FLEMING *v.* W. L. HOLLEMAN AND ARMOUR & COMPANY.

(Filed 12 November, 1925.)

1. Actions—Consolidation—Courts—Appeal and Error—Objections and Exceptions.

The appealing party must except to the consolidation of causes by the judges of the Superior Court, to present the matter to the Supreme Court.

2. Same—Prejudice.

It must appear on appeal from the consolidation of causes of action by the trial judge that it was prejudicial against the appellant therefrom, or that his rights were injuriously affected.

3. Evidence—Motions—Nonsuit.

In defendant's motion to nonsuit upon the evidence, the evidence must be taken in the light most favorable to plaintiff, and he is entitled to the benefit of every reasonable inference or intendment thereon.

4. Employer and Employee — Master and Servant — Pleadings—Admissions—Negligence—Instructions.

In an action to recover damages for the negligence of the one driving defendant's automobile, the admission in the answer to the allegation in the complaint that he was the defendant's local manager, and was driving, at the time of the alleged negligent injury, home from performing his duties to the defendant, and using the automobile in connection therewith, is an admission of his agency that will bind the principal for his negligent act.

5. Negligence—Evidence—Automobiles—Statutes—"Law of the Road"—Negligence per se—Nonsuit.

Upon evidence that the plaintiff was about in the middle of the street in a city after dark, assisting one whose buggy had been injured in a collision with an automobile, on a dark and stormy night, and that the defendant approached at a speed exceeding that allowed by law at such places, without signal or warning, where plaintiff could be seen by the light from a street lamp, with room to pass him without injury, and caused the injury complained of in the action: *Held*, the violation of the statute and ordinances enacted under statutory authority, under the circumstances was evidence of the defendant's negligence *per se*, and sufficient to deny defendant's motion as of nonsuit thereon, C. S., 2616, and 2618, amended by ch. 272, Public Laws of 1925.

6. Same—Contributory Negligence—Burden of Proof.

The burden of showing contributory negligence is on the defendant pleading it; and, *Held*, where the evidence of defendant's actionable negligence is shown, the issue should be submitted to the jury.

7. Evidence—Personal Injury—Exhibiting Injury—Experts—Consent—Damages—Appeal and Error—Issues.

Where the plaintiff in an action to recover damages for a personal injury goes upon the stand and exhibits or exposes the injured place to the jury, the defendant, as a matter of right, may have it subjected to an

expert or medical investigation upon the issue as to the amount of damages recoverable, and the action of the court requiring the consent of the plaintiff thereto is reversible error, entitling the defendant to a new trial, and only upon that issue when alone involved in the error.

APPEAL by defendants from *Daniels, J.,* and a jury, at May Term, 1925, of WAKE Superior Court. Partial new trial.

Vance Fleming and his wife brought two separate actions against defendants. Complaints and answers were filed in both cases.

Plaintiff, Vance Fleming, contends: That on 19 February, 1924, W. L. Holleman was the local manager, agent and employee of Armour & Company, a corporation doing business in Raleigh, N. C., and on that date, about 6:30 o'clock p. m., was engaged in the operation of a Ford coupé for and in behalf of Armour & Company, and with its knowledge, consent and approval. That on the said date and hour, Vance Fleming was standing at the rear of a wagon that at said time occupied a position near the center of North Wilmington Street, between Jones and Lane streets, in the city of Raleigh, N. C., which said wagon had shortly theretofore been struck and damaged by an automobile, and that plaintiff was assisting the owner of said wagon in making an inspection thereof in order to determine the extent of the damage thereto, and he was at said time facing in a northerly direction, when the defendant, W. L. Holleman, the local manager, agent and employee of the defendant, Armour & Company, who was operating its said Ford coupé for and in behalf of the said Armour & Company, and with its knowledge, consent and approval, approached said point on said North Wilmington Street in said Ford coupé, driving northerly on said street, and negligently, carelessly and recklessly, and without any notice or warning to the plaintiff, caused, allowed and permitted said Ford coupé to run into, over and upon the plaintiff, and violently collide with said wagon, and, as a direct and proximate result thereof, plaintiff was seriously, painfully and permanently injured. (1) In that the defendants negligently, carelessly and unlawfully ran and operated said Ford coupé over and upon said North Wilmington Street, which was a principal and much used street in the city of Raleigh, N. C., at a high, negligent and unlawful rate of speed; (2) In that the defendants negligently, carelessly and wrongfully ran and operated said Ford coupé in a negligent and careless manner, and in such manner as to endanger, and which did in fact endanger, the life and limb of persons rightfully using the said street at said time; (3) In negligently and carelessly failing to keep a reasonable, constant and proper lookout as it was their duty to have done; (4) In negligently and carelessly failing to observe the presence of the plaintiff, and in negligently and carelessly failing to signal, notify or warn him of the approach of said Ford coupé to said point; (5)

and in negligently and carelessly failing to have said Ford coupé under control and in negligently and carelessly failing to reduce the speed thereof or to stop the Ford coupé in order to avoid said collision, when by so doing the defendants could have avoided injuring the plaintiff; (6) and in negligently and carelessly failing to pass the plaintiff when there was ample space in said street for said automobile to have passed without running into and over the plaintiff.

The defendants contend that neither Holleman nor Armour & Company were negligent, and contend that in the operation of the Ford coupé by Holleman at the time of the injury, Armour & Company were in no way responsible. They set up the plea of contributory negligence and contend: (1) That the wagon was standing in the street, contrary to the city ordinance, and without a light or any warning to travelers on the street; it was the duty of the owner to remove it or provide a light or some other signal to warn travelers; (2) at the time of the collision the plaintiff was carelessly and negligently standing on or near said wagon, near the center of the street, that he knew or should have known the wagon was unlighted to warn persons traveling on said street; (3) that at the time of the collision, Holleman was driving the automobile at a slow and lawful rate of speed, in a careful and prudent manner, having the auto under control and keeping a careful and proper lookout; (4) that at the time of the collision it was raining and sleeting, which tended to obscure the vision of the driver, which fact the plaintiff knew or should have known; (5) that Fleming carelessly and negligently stood on or near the unlighted wagon in the center of a much traveled street, when he knew or should have known that the atmospheric condition was such that it was impossible for a person traveling in an auto to see unlighted obstructions. That he failed to give any signal or warning that he was in the street at the time. That the plaintiff's carelessness and negligence was the proximate cause of the injury.

The record shows: "The court in its discretion ordered that these actions be consolidated and tried together. . . . It appearing that these two cases, Nos. 9069 and 9070, arose out of the same alleged negligence of the defendant, and the only difference in them was as to the damages sought to be recovered by Vance Fleming in one case and Mrs. Vance Fleming in the other, and the court, of its own motion, ordered that the cases be consolidated and tried together."

The issues submitted to the jury and their answers thereto, were as follows:

"1. Was the plaintiff, Vance Fleming, injured by the negligence of the defendant, W. L. Holleman, as alleged in the complaint? Answer: Yes.

"2. Was the plaintiff, Vance Fleming, injured by the negligence of the defendant, Armour & Company, as alleged in the complaint? Answer: Yes.

"3. Did the plaintiff, Vance Fleming, by his own negligence, contribute to his injury, as alleged in the answer? Answer: No.

"4. What damage, if any is the plaintiff, Vance Fleming, entitled to recover? Answer: $12,500.00.

"5. Was the plaintiff, Mrs. Vance Fleming, injured by the negligence of the defendants, as alleged in her complaint? Answer: No.

"6. What damages, if any, is the plaintiff, Mrs. Vance Fleming, entitled to recover of the defendants? Answer: ....."

There was a judgment on the verdict and appeal to the Supreme Court. Many exceptions and assignments of error appear in the record. The other material facts will be set out in the opinion and the relevant assignments of error.

Douglass & Douglass, R. N. Simms and R. L. McMillan for plaintiffs.

Winston, Winston & Brassfield and Jones, Jones & Horton for defendants.

CLARKSON, J. The consolidation of the two actions which defendants assign as error, we cannot so hold. Defendants did not except to the order, although plaintiffs did. The jury having found that Mrs. Vance Fleming was not injured by the negligence of the defendant and awarded her no damages, we think, on the whole record, defendants have not been prejudiced by the consolidation, or their rights injuriously affected. The principle laid down in *Ins. Co. v. R. R.*, 179 N. C., p. 260, is correct: "The object of consolidating two or more actions is to avoid a multiplicity of suits, to guard against oppression or abuse, to prevent delay, and especially to save unnecessary cost or expense; in short, the attainment of justice with the least expense and vexation to the parties litigant. Consolidation, however, is improper, where the conduct of the cause will be embarrassed, or complications or prejudice will result, which will injuriously affect the rights of a party. 8 Cyc., 591."

At the close of the evidence each defendant renewed his motion for judgment as of nonsuit against each plaintiff. The refusal of the court below was assigned as error. We have often said: "On a motion to nonsuit, the evidence is to be taken in the light most favorable to plaintiff, and he is entitled to the benefit of every reasonable intendment upon the evidence, and every reasonable inference to be drawn therefrom." *Lindsey v. Lumber Co.*, 189 N. C., 119, and cases cited; *Barnes v. Utility Co., ante*, 382.

Facts: Vance Fleming, who lived at 217 N. Wilmington Street, between Jones and Lane streets (fourth house from corner on left-hand side

going north), in Raleigh, at about 6:30 o'clock p. m., on 19 February, 1924, was in his living room reading the evening paper and heard a commotion outside—one calling for help. He testified, in part: "I went to Mr. Hinshaw's wagon; it was south of Lane Street, and the shafts were in Lane Street, and there was plenty of light around there. I saw the wagon as I went out from the house and when I got there it was more to the east side of Wilmington Street. I thought I would assist him any way I could and was making an inspection of the wagon to see how badly it was damaged, and there was an argument about a bolster being damaged, and I struck a match and held it behind the hind wheel to see if it was broke, and some one hollered 'look out,' and the lick all came at the same time, and that is when I was struck. I was standing at the left back wheel. I had no notice of the approach of a car, and no horn sounded. It broke my leg, and I was so that I could not get away from that spot, and was losing blood. After the automobile hit the wagon it bounced back. I was between the automobile and the wagon. Mr. Hinshaw was just ahead of me at that time." He described his injuries and suffering, etc. . . . "It was about 6:30 in the afternoon when I had this accident, and it was after the lights were on. It was not very dark: it was dark under the part of the wagon I was inspecting, and I had to strike a match. It was a rainy night, but not sleety or freezing. Some one came in and said the wagon had been broken and I went out there to assist the man in trouble, Mr. Hinshaw. He was a little to the east; it was more to the right of the center of the street. I think I was there a little over five minutes. There were no lights on the wagon. I was southward of the wagon when I was hurt; while I was in that position some one bumped into me with a Ford and some one hollered all at the same time."

J. G. Jones, who lives at 223 N. Wilmington Street, testified in part: "The night of Mr. Fleming's injury I was on my porch. I saw the automobile that struck him; I saw it when it passed in front of the house, and then it was 100 feet from the point where it collided. It was making between twenty and twenty-five miles per hour. It was a rainy and bad night. I heard the car when it collided with the wagon and it was dark and I could not see it when it hit. The wagon was on the right side going up. There was plenty of room on the left for him to pass on the right side. I did not hear any signal of approach given of the car. At first there was another car that ran into the wagon. I was there on the porch and had been sick, and I heard the other car run into it. I think the mule or horse that was hitched to the wagon had been carried over to the side street. I am familiar with the arc light at the intersection of Wilmington and Lane Streets. There is nothing there to obscure the vision of a person looking in the

street. I could see it distinctly. I went to the scene of the collision after Mr. Fleming was hurt and he was in the edge of the curve below the car. You could see the blood and he seemed to be suffering a great deal. I helped carry him to the hospital and he was still suffering a great deal, and I helped undress him. . . . I was on my porch and I live on the west side of Wilmington Street next door to where Mr. Fleming lived. My house is about 100 feet from where the crash was. This wagon was standing a little to the right of the center of Wilmington Street, facing north. I think the arc light is in the center of the intersection, practically all of them are. I think this light is practically in the center of the street. This night was bad and rainy, and it was cold. I expect it was cold enough for the rain to freeze on the windshield, but I am not sure. The automobile struck the wagon and I heard the crash; I saw some one but did not know it was Mr. Fleming until afterwards."

Part of C. S., 2616, is as follows: "*Upon approaching a pedestrian who is upon the traveled part of any highway, and not upon a sidewalk,* and upon approaching an intersecting highway or a curve, or a corner in a highway where the operator's view is obstructed, every person operating a motor vehicle *shall slow down and give a timely signal with his bell, horn, or other device for signaling.* (Italics ours.) Upon approaching an intersecting highway, a bridge, a dam, curve, or deep descent, and also in traversing such intersecting highway, bridge, dam, curve, or descent, a person operating a motor vehicle shall have it under control and operate it at such speed, not to exceed ten miles an hour, having regard to the traffic then on such highway and the safety of the public."

C. S., 2618. It may be noted that this section has been amended by Public Laws 1925, chap. 272:

(1) 20 miles per hour in the built-up residential section of any village, town or city, etc.

(2) 12 miles per hour in the business portion of any town or city.

(3) 15 miles per hour while passing any church or school when people are leaving or entering.

(4) 15 miles per hour in traversing an intersection of highways when the driver's view is obstructed, etc.

(5) 15 miles per hour in traversing or going around corners of a highway, etc.

(6) 35 miles per hour on all highways beyond the built-up residential section of incorporated cities, towns, etc.

(7) The governing body of every incorporated city or town shall have authority by ordinance to make reasonable street crossing regulations. (This section was passed to meet the decision in *S. v. Stallings,* 189 N. C., p. 104.)

(8) No person shall operate upon the public highways or streets a motor vehicle with muffler cut-out open, or with exhaust whistle or objectionable signal devices.

This act shall not be construed to repeal any Public-Local Law providing for a greater rate of speed, etc.

At the time of the collision and injury, under the statute then in force, it being in a residential portion of the city, a person could not operate a motor vehicle at a rate of speed in excess of 18 miles per hour. C. S., 2618, *supra.* The witness, Jones, testified for plaintiff that defendant, Holleman, was making between twenty and twenty-five miles per hour.

In *Davis v. Long,* 189 N. C., p. 134, we said: "A statutory duty was imposed on defendant. He failed to do what the law required of him. This was negligence *per se,* and it was a question for the jury to say whether or not such negligence was the proximate cause of the injury to plaintiff." *Albritton v. Hill, ante,* 429.

The second issue: "Did Vance Fleming by his own negligence contribute to his injury?" The burden of proof rests with defendant. Plaintiff, on an act of mercy, had gone into the public street at the cry for help—he went to "assist the man in trouble." A Mr. Hinshaw's wagon had been struck by a passing automobile. It was a rainy and bad night, but there was an arc light at the intersection of Wilmington and Lane streets. Fleming was standing at the left back wheel. He testified "there was plenty of light around there." He was struck from the rear by the car Holleman was operating, and was between the automobile and the wagon. No notice was given Fleming by sounding a horn or otherwise. There was abundant evidence to be submitted to the jury that defendant, Holleman, was negligent and his negligence was the proximate cause of the injury, and that plaintiff Vance Fleming was not guilty of contributory negligence. All the aspects of negligence and contributory negligence were submitted carefully to the jury by the court below, and the law applicable to the facts. Fleming was in the street, well lighted, a place that he had a right to be, and without warning the defendant, running twenty or twenty-five miles an hour, struck him. The defendant Holleman contends to the contrary, but the jury has accepted plaintiff's version. We think the court below was correct in refusing to grant the motion to nonsuit. The law of the road gives pedestrians rights which the drivers of automobiles are bound to respect. The rule of law and of the road is that when approaching a pedestrian upon the traveled part of the highway, the person operating a motor vehicle shall slow down and give a timely signal with his bell, horn or other device for signaling. C. S., 2616, *supra.* Although this has been statutory law for nearly nine years, yet

injuries are occurring almost daily by nonobservance of the rule of the road by automobile drivers. The speed regulations have been in force a like time.

Defendants assign error: "To the statement of the court that the defendant, Armour & Company, admitted that the defendant, Holleman, was at the time of the injury operating its car for and on behalf of the defendant Armour & Company. There is no such admission on the part of Armour & Company. It did admit in its answer that it owned this automobile. It admitted that Holleman was its employee, but it did not admit that the defendant Holleman was at the time of the accident acting within the scope of his authority or that he was engaged in the business of Armour & Company." This cannot be sustained. Section 6 of plaintiff's complaint is as follows: "That on the 19th day of February, 1924, the defendant, W. L. Holleman, the defendant, Armour & Company's local manager, agent and employee, was engaged in the operation of said Ford coupé for and in behalf of the defendant, Armour & Company, and with its knowledge, consent and approval." Section 6 of answer is: "That the allegations of paragraph 6 of the complaint are admitted." W. L. Holleman testified: "I used this car in going backward and forward. On this night in question I was driving a Ford that belonged to Armour & Company, which car I kept at my home. On 19 February, 1924, I drove this car toward my home. . . . Have been using it constantly since then. I only use this car in the company's business. At the time of the accident I was on my way home." We think all the evidence on this phase sufficient to justify the court below in the charge as given. *Williams v. R. R., ante,* 366.

From a careful review of the case we can find no reversible or prejudicial error on the first, second and third issues. On the fourth issue as to damages, we feel compelled to send the case back for a new trial.

The testimony of Vance Fleming, in his direct examination, is as follows: "My leg is swollen some today, but not as much as yesterday. (Witness here pulls his trousers up and exhibits his leg to the jury.) It was broken right here. (Indicates a place about midway between the knee and ankle.) There is a difference in the color of the two limbs. When you press upon this injured leg the dent will stay in, it is like a mellow apple, and the other leg is not like that. There is not much feeling in the injured leg. The most severe pain is right across here. (Indicates broken place.) I still suffer with pain in my hip; it is a tired, aching feeling."

Dr. Ben J. Lawrence and Dr. Upchurch, experts, testified to examining and treating Fleming after the injury, and the extent of the injury, etc. After the testimony of plaintiff and Dr. Lawrence, and during

the progress of the trial, the following occurred: "In open court the attorneys for the defendant tender to the plaintiff, Drs. Glascock and Caveness and ask leave of the court for them to examine the plaintiff either in the presence of the jury or in the back room. Counsel for plaintiff asked that this be done in the presence of Dr. Ben J. Lawrence, and it having been disclosed to the court that there seems to be some feeling between Dr. Glascock and Dr. Lawrence, the court declines the motion, on the ground that these gentlemen do not seem to be personally friendly." The defendants excepted and assigned error. The court: "I understood, with the plaintiff's consent, that the plaintiff shall be examined by a physician selected by the defendants in the presence of Dr. Lawrence, but it appearing that Dr. Glascock, selected by the defendant, refused to go to the office of Dr. Lawrence, as there seems to be some feeling, I decline to order the plaintiff to be examined under the circumstances that have been mentioned."

22 C. J., p. 790, states the matter as follows: "A plaintiff cannot be compelled to submit to an examination by an expert in the presence of the jury, and the refusal of a request for such an examination is not rendered improper by the fact that the plaintiff afterwards offered to exhibit the injured member to the jury. But an expert may, at the instance of plaintiff, examine his injured member in the presence of the jury, and where plaintiff voluntarily exhibits the injured member to the jury, it may be examined by an expert on behalf of the defendant."

Under the facts and circumstances in the instant case, we think defendants had a right to have an expert examine plaintiff's injured member. This right does not extend except to the injured member or part of body that plaintiff voluntarily exhibits to the jury. In the trial of all cases the purpose is to ascertain the truth. The "inviolability of the person" is not lightly to be impinged, but where a plaintiff voluntarily waives the inviolability by exposing his person to accentuate the damage, it is but justice that at the instance of a defendant who may suffer by the exposure to have expert examination. In *Haynes v. Trenton,* 123 Mo., p. 336, it is said: "Defendant had the undoubted right in his case, at any time after the injuries had been shown to the jury to have physicians examine the injured leg and testify as experts to its character and probable permanency." In *Pronskevitch v. C. & A. Ry. Co.,* 232 Ill., p. 140, it is said: "Appellee having offered his body voluntarily to the inspection of the jury, it then became a subject of examination under such reasonable restrictions as the court might see fit to require. Inasmuch as appellee offered to submit to such an examination, in the presence of the jury, as the appellant might see fit to make, there was no just cause for complaint." *Galveston, H. & S. A.*

Ry. Co. v. Chojnacky, 163 S. W. Rep., p. 1012, the Court says: "The moment, however, he submitted his eyes for examination to the jury, he doffed the armor placed on his person by the hand of the law and was the subject of examination of experts."

Frequently attorneys representing opposing sides in injury cases agree to an examination in the interest of truth and justice, and the practice has become in recent years prevalent and to be commended. We have been unable to find any authority, and none has been called to our attention, where this Court has before passed on the question here presented. Under the facts and circumstances of this case we hold that when the plaintiff voluntarily exhibited the injured member, or part of the body, to the jury, the defendant had a right to the examination. It is for the trial court in its discretion to allow the examination "under reasonable restrictions" in the presence of the jury. One of defendants' requests was "in the presence of the jury." The old saying is applicable: "What is sauce for the goose is sauce for the gander." We think the weight of authority permits expert examination before the jury under the facts here. The whole subject is most interestingly discussed by Wigmore in his valuable work on Evidence, 4th Vol., 2 ed., sec. 2220. Lockhart's Handbook on Evidence, sec. 32; *Chicago & N. W. Ry. Co. v. Kendall,* 167 Fed. Rep., p. 71; *Louisville & Nashville R. R. Co. v. Simpson,* 111 Ky. Rep., 757; *C. R. I. & T. Ry. Co. v. Langston,* 19 Texas, C. A. Rep., 572.

On the other issues the case has been carefully tried by the court below, the charge was fair and comprehensive, covering every phase presented, and the law carefully applied to the facts. The case is sent back only for trial on the fourth issue of damages.

For the reasons given, there must be a partial

New trial.

POLLIE A. DOUGLASS, EXECUTRIX OF MILEY JONES, ET AL. v. GUY DAWSON, D. N. NEWSOME, J. E. MAY, W. D. COBB, JOHN R. WOOTEN, H. W. BROTHERS, D. W. WOOD, J. R. MARVIN AND J. E. JONES.

(Filed 12 November, 1925.)

1. Banks and Banking—Receivers—Actions—Parties.

Upon the appointment of a receiver of a banking institution of this State, under the statute, whether voluntary or by act of the Corporation Commission, the title to all of its assets vests in the receiver to be administered for the benefit of its depositors, etc., alike, and where the directors are individually sued for having published false statements as

to its solvency, and in the bank's report to the Corporation Commission, without alleging any damage peculiar to himself therefrom, as distinguished from a loss among the creditors generally, the action is maintainable only by the receiver or upon his refusal to so act upon application. C. S., Vol. III, secs. 218(a), 218(c), 219(a), C. S., 1210.

2. Same—Pleadings—Demurrer.

Where a complaint against the directors or officers of a bank in the receiver's hands under our statute, alleges that they by their acts of omission or commission have authorized the making of false reports or advertisements of the solvency of the bank, etc., and thereby caused loss to depositors or creditors, and no special circumstance is alleged to show that the plaintiff has been peculiarly damaged by false representations made to him personally, or that the receiver has been asked and refused to act, a demurrer to its sufficiency of allegation to constitute a cause of action will be sustained.

APPEAL by plaintiff from judgment of Superior Court of CRAVEN, February Term, 1925, *Barnhill, J.*, presiding. Affirmed.

Action to recover of defendants, directors of the Farmers' Bank & Trust Company, damages for loss of the sum of $1,400, deposited by Miley Jones with said company and lost by reason of its insolvency alleged to have been caused by the negligence and wrongful acts of defendants. Defendants demurred to the complaint. From judgment sustaining the demurrer, plaintiffs appealed.

Ward & Ward for plaintiffs.
Rouse & Rouse for defendants.

CONNOR, J. The facts as alleged in the complaint are as follows: The Farmers' Bank & Trust Company is a corporation, organized under the laws of North Carolina. Prior to 16 December, 1920, said company was engaged in the banking business at LaGrange, N. C. On 24 September, 1920, said company issued to Miley Jones, a certificate of deposit for the sum of $1,400 in renewal of a certificate for said sum issued to her prior to said date. On 16 December, 1920, the said Miley Jones transferred and assigned said certificate to plaintiffs, A. D. Ward and W. F. Ward, to secure certain liabilities which they had assumed for her. Miley Jones died on 20 June, 1922, and plaintiff, Pollie A. Douglass, has duly qualified as executrix of her last will and testament.

Defendants were on 16 December, 1920, and had been for some years prior thereto, directors of the Farmers' Bank & Trust Company. The said company is now in process of liquidation, with all its assets in the hands of a permanent receiver appointed on 16 December, 1920. These assets, including all sums that may be realized by the receiver from

an assessment of 100 per cent, made upon the stockholders of said company, will not be sufficient to enable the receiver to pay any substantial dividend upon the claims of unsecured creditors and depositors. The company is wholly insolvent. No dividend has been paid upon the certificate of deposit issued to Miley Jones; there are no assets of said company available for payment of dividends of any appreciable amounts upon same by the receiver.

Plaintiffs allege that said company became and was insolvent as the result of the failure of defendants to perform the duties imposed upon them as directors of said company by its by-laws, rules and regulations, and by the laws of the State of North Carolina; that it was the duty of said directors to actively manage and superintend the business of said company; to examine regularly the discount book of said company, containing a statement of all loans, to whom made, the securities taken therefor, and when due; to appoint periodically a committee of the board of directors to examine the books of said company and to report to the board of directors; to investigate and examine the liabilities of said company for borrowed money, and the collaterals hypothecated to secure said liabilities; and also to make, from time to time, true reports to the Corporation Commission of North Carolina, showing the assets and liabilities of said company, and to cause statements of the true condition of said company to be published as required by statute, to the end that Miley Jones and other creditors and stockholders and customers and prospective customers of said company might know its true condition.

Plaintiffs further allege that by reason of the failure of said defendants to perform their duties as aforesaid, loans in large amounts were made by the company and its officers upon inadequate security, to insolvent persons, friends, pets and favorites of defendants and of officers of said company; that as a result of the wrongful acts, both of commission and omission, of defendants, the company became insolvent; that after the company became insolvent, defendants made annual statements to its stockholders, showing the company to be solvent, its capital stock unimpaired and its surplus intact; that defendants, while the company was insolvent, declared dividends to stockholders; that after the company became insolvent, with knowledge of such insolvency, and with intent to cheat and deceive Miley Jones and other customers, and prospective customers of said company, defendants wrongfully and fraudulently caused statements to be made to the Corporation Commission of North Carolina, and to be published in newspapers, showing the company to be solvent; that such statements were made and published for the purpose of showing the company to be solvent, and worthy of credit, and a safe banking institution;

that defendants knew at the time such statements were made and published that they were false and untrue; that Miley Jones knew that such statements had been made and published and believed that same were true; that relying on the truth of such statements, the said Miley Jones made the deposit hereinbefore referred to, taking a renewal certificate therefor on 24 September, 1920; that said Miley Jones did not know or learn of the insolvency of said company until after the appointment of the receiver on 16 December, 1920, and that by reason of the negligence and wrongful acts, and the deceit and fraud of defendants and each of them, the said Miley Jones and these plaintiffs have lost the sum of $1,400 and interest on same from 24 September, 1920.

Plaintiffs further allege that defendants knew and were required by law to know that said company was insolvent and unworthy of credit, and that with such knowledge actual or imputed by reason of their relation to said company, defendants fraudulently and with intent to deceive the public and said Miley Jones, permitted the said company to continue in business and to receive deposits and to keep the deposit of Miley Jones, who was ignorant of the true condition of said company, and who relied upon the statements made and published by defendants showing that said company was solvent and worthy of credit; and that by reason of such wrongful conduct of defendants, Miley Jones and the plaintiffs have lost the sum of $1,400 and interest on same from 24 September, 1920.

Plaintiffs further allege that the defendants negligently and fraudulently, with intent to deceive and mislead the said Miley Jones and the public, permitted standing advertisements to be published, falsely setting forth the solvency of said company, with the purpose of inducing Miley Jones and the public in general to deposit and keep on deposit money with said company; that at the time such statements were made and published, the company was insolvent, as defendants well knew or ought to have known; and that Miley Jones, relying upon the truth of such statements, made in the advertisements as aforesaid, made and kept said sum on deposit with said company and thereby the said Miley Jones and the plaintiffs lost the sum of $1,400 and interest from 24 September, 1920.

Defendants demurred to the complaint on the following grounds:

1. That this action is premature in that the law prescribes the procedure which the receiver shall follow in winding up insolvent corporations and enforcing liability, if any, against the stockholders, officers and directors and that plaintiffs do not allege that these statutes have been complied with.

2. That the cause of action, if any, against the defendants is vested in John G. Dawson, receiver of the Farmers' Bank & Trust Company, and that it does not appear from the complaint that demand has been made upon the said receiver to institute the action, and that the said receiver has wilfully and wrongfully refused to institute said action.

3. That the complaint does not state facts sufficient to constitute a cause of action against the defendants.

The procedure for the voluntary liquidation and dissolution of a corporation, organized and engaged in the business of banking under the laws of North Carolina is prescribed by statute. Such dissolution may be had upon the affirmative vote of stockholders owning two-thirds of its stock, taken at a meeting of stockholders called for that purpose by resolution of the board of directors. No such dissolution may be had, however, without the approval of the Corporation Commission, whose approval shall not be given until the said commission is satisfied that provision has been made to satisfy and pay off depositors and creditors of said corporation. During the process of voluntary liquidation, for the purpose of dissolution, the corporation shall be subject to examination by the Corporation Commission and shall furnish such reports from time to time as may be called for by the Corporation Commission. Public Laws 1921, chap. 4, sec. 15; C. S., vol. III, 218 (a). The procedure is similar to that prescribed for the voluntary dissolution of a National bank. R. S., 5220 *et seq.*, U. S. Comp. Stat., 9806 *et seq.*

The procedure for the involuntary liquidation of such corporation is also prescribed by statute. If the Corporation Commission shall, at any time, find that such corporation is insolvent, or if such corporation shall neglect or refuse to obey or comply with any order made by the Corporation Commission, in the exercise of powers vested in said commission by law, the Corporation Commission shall have authority to take charge of such corporation, and if upon investigation it appears to be to the interest of creditors, depositors and stockholders that a receiver should be appointed, it may apply to the court for the appointment of a competent person as receiver for said corporation. When such receiver has been appointed and has qualified, he shall, under the direction of the court, take possession of the books, moneys, records, and assets of every description of such corporation, and collect all debts, dues and claims belonging to it. If necessary to pay the debts of the corporation, the receiver may enforce the individual liabilities of its stockholders by suits for that purpose in the name of such receiver. Such corporation while it is being operated or liquidated under a receivership, shall remain subject to examination and supervision by the Corporation Com-

mission. Public Laws 1921, ch. 4, sec. 17. C. S., vol. III, 218 (c). For provisions in the National Bank Act, relative to appointment of receivers, see U. S. Comp. Stat., 9821, 9826.

The rights of creditors, depositors and stockholders of a corporation, engaged in the banking business, under the laws of this State, upon its dissolution, whether voluntary, at the instance of directors and stockholders, or involuntary, upon the application of the Corporation Commission, to have all the assets of the corporation administered for their benefit and applied in satisfaction of their claims upon or interests in said assets are thus protected by statute. In the event of a voluntary dissolution, upon the approval of the Corporation Commission, all claims of creditors and depositors must be fully satisfied and paid off. As such dissolution can be had only upon the action of stockholders, no requirement is found in the statutes for their protection other than that the liquidation shall be under the supervision of the Corporation Commission. After the payment of all claims of creditors and depositors, the remaining assets belong to the stockholders. In the event of an involuntary dissolution which can be had only because of the insolvency of the corporation, or because of its neglect or refusal to obey or comply with a lawful order of the Corporation Commission, all the assets of the corporation, including amounts assessed against stockholders, pursuant to statute making them individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements of the corporation, to the extent of the amount of their stock at par value (C. S., vol. III, 219 (a) pass to and vest in the receiver. After the payment of all expenses incurred by the receivership, the entire assets must be applied by the receiver to the payment of dividends upon the claims of creditors and depositors, and the surplus, if any, distributed among the stockholders. The manifest purpose of these statutory provisions is to secure a just and equitable distribution of all the assets of the corporation, upon its dissolution, among all who have claims upon or interests in said assets, in accordance with their respective priorities. To accomplish this just purpose and to bring about this equitable result, upon an involuntary dissolution, the title to all the assets of the corporation, under the statute, passes to and vests in the receiver, immediately upon his appointment. C. S., 1210. *Hardware Co. v. Holt,* 173 N. C., 308; *Observer Co. v. Little,* 175 N. C., 42. Actions to recover such assets must be brought and prosecuted by the receiver, in his name, as representing all the creditors as well as the corporation, in process of liquidation, or if such actions are brought by creditors or stockholders, it must be alleged in the complaint that demand was made upon the receiver to institute the action and that he has refused to comply with said demand. In an action brought by creditors, depositors

or stockholders to recover assets belonging to the corporation, the title to which has vested in the receiver, upon his refusal to bring the action the receiver may properly be made a defendant, to the end that the recovery may be subject to orders and decrees by the court, in the judgment as to its application to the claims of creditors and depositors, or to its distribution among stockholders. C. S., vol. III, 218(c), 218(e); C. S., 1210; *Besselliew v. Brown,* 177 N. C., 65, 2 A. L. R., 862; *Pender v. Speight,* 159 N. C., 612; *Black v. Power Co.,* 158 N. C., 468; *Chemical Co. v. Floyd,* 158 N. C., 456; *Smathers v. Bank,* 135 N. C., 410; *Coble v. Beall,* 130 N. C., 533. See *Murphy v. Greensboro, ante,* 268; *Hart v. Evanson,* 3 L. R. A. (N. S.), 438 and note; *Ellis v. Gates Mercantile Co.,* 43 L. R. A. (N. S.), 982; *Union National Bank v. Hill,* 71 Am. St. Rep., 615, 7 C. J., 569.

The test, therefore, to be applied to determine whether or not, the cause of action, if any, alleged in the complaint, is vested in the receiver, and must be prosecuted by him, or may, upon his refusal, after demand, to institute the action, be maintained by creditors, depositors or stockholders, is the title or ownership of the sum, or sums, which may be recovered of defendants as damages for their negligence and wrongful acts. If the sum or sums for which defendants may be liable, and which may be recovered upon the cause of action set out in the complaint, constitute assets of the corporation, the action must be prosecuted by and in the name of the receiver, or his refusal, upon demand, must be alleged in order that a creditor, a depositor or stockholder may maintain the action.

Sums paid by stockholders of a bank or recovered of them by a receiver, on account of their statutory liability, C. S., vol. III, 219 (a), are assets of the bank, to be administered by the receiver for the benefit of all creditors and depositors of the bank. Sums which may be recovered of stockholders, directors or officers as damages for negligence in the performance of duties which they owe to the bank, or for wrongful acts which result in loss by the bank, are likewise assets of the bank. The cause of action for the recovery of such sums, upon the insolvency of the bank, vests in the receiver, as the representative of all its creditors, depositors or stockholders; the action must therefore be brought by the receiver, or if brought by creditors, depositors or stockholders, they must allege that the receiver, upon demand, has refused, or failed and neglected to institute the action. The cause of action relied upon in *McTamany v. Day,* 128 Pac., 563, is almost identical with that set up in the complaint herein. The action was dismissed. In its opinion, the Supreme Court of Idaho says, "If the bank has suffered loss in consequence of the directors' fraud, gross negligence or wilful breach of duty, after such corporation

is placed in the hands of a receiver it is the duty of the receiver, as the representative of all concerned, to proceed and collect all claims of such corporation due said bank by contract, or caused by the fraud, gross negligence, or wilful breach of duty of the officers thereof, so that whatever may be recovered may be properly distributed among all of the creditors of the bank as the law or court may direct." 7 C. J., 747, sec. 541 and cases cited. *Clark v. Union Bank*, 72 W. Va., 491, 78 S. E., 785.

In Tiffany on Banks and Banking, page 306, it is said, "Of course, where the corporation is in the hands of a receiver or assignee, as the representative of all concerned, he is the proper party to maintain an action," *i. e.*, an action to recover of officers or directors for losses sustained by the bank, resulting from their negligence and dishonesty in the management of the corporate affairs. In *Coble v. Beall*, 130 N. C., 533, *Justice Montgomery*, in the opinion for the Court, to which there was no dissent, says: "The cause of action in this case is one primarily in behalf of the corporation against the directors. The plaintiff alleges that the wrongful conduct of the defendants in the management of the corporate property affected the interest of all stockholders alike, that it was not peculiarly injurious to her individually." It is held that there was error in not sustaining the demurrer. The Court says, "The counsel for the plaintiff relied on the decisions of this Court in *Soloman v. Bates*, 118 N. C., 311, 54 Am. St., 725; *Tate v. Bates*, 118 N. C., 287, 54 Am. St., 719; *Townsend v. Williams*, 117 N. C., 330; *Houston v. Thornton*, 122 N. C., 365. There may be expressions in those opinions which, if taken in detached sentences, might seem liable to the construction put upon them by the counsel of the plaintiff; but the matter for decision in this case, to wit, the right of a stockholder individually to sue the directors of a corporation for fraudulent and wrongful mismanagement of the corporate property, without first having made a demand on the directors to bring the action, and their refusal to do so, was not the question before the Court for decision in the cases last above referred to. In the first three of those cases, the actions were brought by individual depositors against the officers of the defendants for fraudulently inducing the plaintiffs to make deposits of money in the banks of the defendants, the banks being insolvent at the time; in the last mentioned case, the plaintiff was induced to take stock in the defendant corporation by the device of circulars issued by the defendant, containing statements false and fraudulent. Those causes of action were founded upon injuries peculiar to the plaintiffs themselves, and any recovery in them could not have passed to the directors for the benefit of the corporation and indirectly for the benefit of the other depositors."

The judgment in *Russell v. Boone,* 188 N. C., 830, was affirmed, no error having been found upon appeal. This was an action in which plaintiffs, depositors in the Bank of Denton, sought to recover of the directors of said bank damages for the loss of a deposit. An examination of the complaint will disclose that it is alleged therein that defendants made false and fraudulent representations to plaintiffs, with respect to the condition of said bank at the time or shortly before the deposit was made. Defendants did not demur to the complaint. By their answer, they denied the allegations. Recovery was had and sustained for a wrong done to the plaintiffs and not primarily to the bank.

Whether the demurrer should be sustained upon the first or second ground relied upon by defendants will depend upon the correctness of defendants' contention, presented by the third ground stated in the demurrer, to wit, that the complaint does not state facts sufficient to constitute a cause of action against defendants, in favor of plaintiffs.

The loss of the deposit, as evidenced by the certificate, was caused by the insolvency of the bank. It is alleged that the insolvency of the bank was the result of the failure and neglect of defendants to perform the duties imposed upon them, as directors, by the by-laws, rules and regulations of the corporation, and by the laws of the State. These duties are alleged specifically in the complaint; the failure or neglect to perform these duties was a wrong, primarily to the corporation; damages sustained by the corporation by reason of such default or negligence by defendants were recoverable by the corporation; the claim for such damages, upon the involuntary liquidation and dissolution of the corporation passed to and vested in the receiver, as an asset for the payment of creditors and depositors and for distribution among the stockholders.

The facts alleged in the complaint do not show any wrong peculiar to plaintiffs or to Miley Jones, to whom the certificate of deposit was issued. There is no allegation that defendants or either of them made any representation to her individually as to the condition of the bank, prior to the making of the deposit, originally, or while the same was in the bank. The statements alleged to have been published, showing that the bank was solvent and worthy of credit were not made to Miley Jones alone but, as alleged in the complaint, to Miley Jones and the public. The loss which plaintiffs have sustained by reason of the insolvency of the bank, is an injury to them, in common with other creditors and depositors of the Farmers Bank & Trust Company. The facts alleged in the complaint do not constitute a cause of action against defendants upon which plaintiffs alone may recover. Sums recovered of defendants, as damages for the negligence and wrongful acts alleged in the complaint as the cause of the insolvency of the bank, would be

assets of the bank, and should be recovered by the receiver, as the representative of all who have claims upon or interest in such assets.

We do not hold that upon proper allegations a creditor, depositor or stockholder, suing in his individual right, may not recover of officers or directors or a corporation, engaged in the banking business, under the laws of this State, damages for a wrong done to him personally. The high standard of duty, which an officer or director of a bank, owes to its creditors, depositors and stockholders, as consistently maintained and rigidly enforced by this Court, in its decisions, will be upheld and enforced without modification. Damages, however, resulting from breach of official duty, whereby the bank becomes insolvent, and thus unable to pay creditors or depositors, are and should be recovered by the receiver; damages resulting from breach of duty which the officer or director owes to the creditor or depositor, individually, may properly be recovered by the creditor or depositor who has suffered a loss, peculiar to himself. The right of action, by the individual creditor, depositor or stockholder against officers or directors is not affected by the receivership, occasioned by insolvency. 7 C. J., 735. "While a stockholder may bring an action for his individual benefit against officers or directors for the breach of a duty owing to him personally, the courts will not, in order to meet what may seem to be the exigencies of a particular case, create an exception to the rule that a stockholder may not sue the officers of a corporation to make them account to him personally for property which belongs to the corporation." 14 (A) C. J., 155 and cases cited.

It should be noted that by chapter 4 of the Public Laws of 1921, the statute law of North Carolina, relative to banks, is made to conform, in many respects, to the National Bank Act. C. S., vol. III, 221(e), Public Laws 1921, ch. 4, sec. 53 is, with mere verbal changes, U. S. Comp. Stat., 9831, R. S., 5239. The civil liability of directors of a national bank who merely negligently participated in or assented to the false representation as to the bank's financial condition in official reports required by statute, made and published in conformity thereto, is discussed and decided in the opinion by *Chief Justice White* in *Yates v. Jones National Bank,* 206 U. S., 158, 51 L. Ed., 1002. See *Thomas v. Taylor,* 224 U. S., 73, 56 L. Ed., 673; *Chesborough v. Woodworth,* 244 U. S., 72, 61 L. Ed., 1000; *U. S. F. & G. Co. v. Bank,* 154 Iowa, 588, 134 N. W., 857, 45 L. R. A. (N. S.), 421.

We find no error in the judgment sustaining the demurrer to the complaint in this action. The judgment is

Affirmed.

THE LIBERTY CENTRAL TRUST COMPANY v. THE UNION TRUST COMPANY.

(Filed 12 November, 1925.)

1. Evidence—Instructions—Directing Verdict.

Where the evidence and all legal inferences therefrom are unequivocal and in favor of one party to an action, an instruction directing a verdict in his favor is not erroneous.

2. Banks and Banking—Bills and Notes—Negotiable Instruments—Endorsement—Agency for Collection—Principal and Agent.

Where a certificate of deposit in a bank has been endorsed by the depositor to another bank, which credits his account with the amount thereof, and upon its nonpayment thereof the bank charges the account of its depositor therewith upon the ground of his legal liability as an endorser, the evidence is not susceptible of the inference that the discounting bank received the certificate as an agency for collection, and to render it liable for the equities existing between the original parties.

3. Same—Evidence—Instructions.

Where the bank that has issued a certificate of deposit sued on by an endorsee bank interposes the defense that the instrument sued on was nonnegotiable, and subject to the equities existing between it and the payee of the certificate, and offers no evidence of a loss on that account, an instruction directing a verdict in favor of the endorsee bank is properly given by the trial judge. *Semble*, an instrument payable in current funds is nonnegotiable; but, *Held*, the instruction was proper in either event.

APPEAL by defendant from *Daniels, J.*, at April Term, 1925, of the Superior Court of WAKE. No error.

M. Ashby Lambert and Robert N. Simms for plaintiff.
Willis Smith and Winston & Brassfield for defendant.

ADAMS, J. The plaintiff, formerly The Liberty Bank of St. Louis, is a corporation organized and existing under the laws of Missouri, and the defendant is a corporation created under the laws of North Carolina, having its principal office in the city of Raleigh. On 24 August, 1920, the defendant executed and delivered to the Moon Motor Car Company the following certificate of deposit: "Moon Motor Car Company has deposited in this company $13,467.32, payable to the order of themselves in current funds on the return of this certificate properly endorsed 90 days after date with interest at 6 per cent per annum. Interest to cease after 90 days. (Signed) Union Trust Company, By J. Cooper Young, Pres." The defendant's corporate seal was affixed. The plaintiff alleged that the certificate of deposit was negotiable and that the plaintiff was a holder in due course by virtue of the Moon Company's endorsement, transfer, and delivery thereof for value and before maturity, and contended that the title thus transferred was

unincumbered and free from any and all equities pleaded in behalf of the defendant. The defendant denied that the plaintiff was a holder in due course and contended that the plaintiff was the agent for collection of the Moon Company and not the real party in interest; that these two had conspired to collect the amount due on the certificate for the wrongful purpose of relieving the Moon Company from the operation of an attachment and judgment in a case prosecuted against the Moon Company by one H. L. Whitaker; and that the plaintiff in no event would suffer any loss.

On 22 November, 1920, the certificate was protested for nonpayment; but on 21 March, 1921, the defendant made a payment of $11,267.32 with interest from 22 November, 1920, leaving unpaid the sum of $2,200. The defendant denied liability for the remainder, and the plaintiff waived no rights, legal or equitable, but expressly reserved its right to bring suit for the amount claimed. The summons was issued on 25 May, 1921. Upon the trial the plaintiff introduced in evidence the certificate of deposit, the protest thereof, and the deposition of Edward Barklage, vice-president of the plaintiff company. The defendant offered no evidence. Only one issue was submitted to the jury: "Is the plaintiff the holder in due course of the certificate of deposit described in the complaint?" The defendant did not object or except to the issue and agreed that if it should be answered in favor of the plaintiff judgment should be given for the amount alleged to be due. At the conclusion of the evidence the jury were instructed to answer the issue "Yes" if they found the facts to be as testified to by the witnesses; and upon the verdict judgment was rendered for the plaintiff. The defendant excepted to the judgment, to the instruction given the jury, and to the denial of its motion to dismiss the action as in case of nonsuit.

The Negotiable Instruments Law became effective in North Carolina 8 March, 1899, and in Missouri 10 April, 1905. C. S., ch. 58; Laws of Missouri, 1905, 243; Brannan's Neg. Ins., pp. 5, 6, note. It sets forth the requisites of negotiability and of the title to be acquired in due course. Secs. 2982, 2987, 3010, 3033. On the trial the negotiable character of the certificate seems to have been assumed and the controversy to have centered in the question whether the plaintiff was a holder in due course, for the defendant's exceptions were aimed chiefly at his Honor's instruction to the jury. The only evidence of the circumstances under which the plaintiff took a transfer of the certificate appears in the deposition of Edward Barklage. Upon his testimony the defendant contended that the plaintiff had discounted the certificate for the benefit of the endorser (The Moon Company) under an express agreement or an agreement implied from the course of dealing that

if not paid at maturity the paper should be charged back to the endorser; and that the plaintiff had therefore become merely an agent for the collection of the Moon Company's claim. The plaintiff insisted that the deposition was reasonably susceptible of only one construction: that the plaintiff was a holder in due course and held the Moon Company to liability only by reason of the relation created by its endorsement of the certificate of deposit. The law with respect to these contentions is given in *Worth Co. v. Feed Co.,* 172 N. C., 335, 342: "The rule prevails with us, and it is supported by the weight of authority elsewhere, that if a bank discounts a paper and places the amount, less the discount, to the credit of the endorser, with the right to check on it, and reserves the right to charge back the amount if the paper is not paid, by express agreement or one implied from the course of dealing, and not by reason of liability on the endorsement, the bank is an agent for collection and not a purchaser." Again: "Was it the mutual understanding and intention that the title should pass unconditionally to the bank, with no right to charge back except by reason of the endorsement, or was it the intention of the parties that the title should pass conditionally and that credit should be given temporarily for the convenience of the parties, with the right arising by express or implied agreement to charge back? If the first, the bank would be a purchaser for value and the owner, and if the second, it would be an agent for collection." Pages 343, 344. In addition to the cases cited in *Worth Co. v. Feed Co.,* see *Temple v. La Berge,* 184 N. C., 252; *Finance Co. v. Cotton Mills Co.,* 187 N. C., 233; *Bank v. Monroe,* 188 N. C., 446. If the deposition reasonably construed supports the plaintiff's contention and excludes the defendant's there was no error in the instruction complained of; for the evidence would then be neither equivocal nor conflicting so as to prevent a directed instruction. *Bank v. Monroe, supra; Jeanette v. Hovey,* 184 N. C., 140; *Temple v. La Berge, supra.* In *Sterling Mills v. Milling Co.,* 184 N. C., 461, a new trial was granted because, though there was evidence to sustain the intervener's claim, the trial judge directed a verdict against him. The principle would apply here if there were evidence sufficient to uphold the defendant's contention; but a close examination of the testimony has convinced us that the trial judge correctly held that it was not sufficient for this purpose. It will be noted that the admissions of the witness in regard to charging back the account to the endorser relate, not to an agreement of the parties, but to the plaintiff's alleged legal right to look to the endorser for payment or to apply a customer's deposit in satisfaction of his indebtedness to the bank. *Hodgin v. Bank,* 124 N. C., 540; *S. c.,* 125 N. C., 503 (rehearing not material here); *Moore v. Bank,* 173 N. C., 180; *Moore v. Trust Co.,* 178 N. C., 118.

In our opinion, then, the instruction excepted to was free from error if the certificate of deposit was a negotiable instrument. By its terms the money on deposit was payable to the order of the Moon Motor Car Company "in current funds." In *Johnson v. Henderson,* 76 N. C., 227, it was held that a certificate having this provision is not negotiable. This case, it is true, was decided before the enactment of the Negotiable Instruments Law; but Brannan says that the fifth clause of the section in reference to payment in a particular kind of current money (C. S., 2987) leaves the question unsolved. Neg. Ins., p. 27, sec. 6, note d. True, also, this was a suit by the last endorsee against an intervening endorser, and the court said the plaintiff, the ultimate holder of the certificate, stood in the shoes of the payee and his only remedy was against the corporation which issued the certificate of deposit. In the case at bar the defendant issued the paper sued on. Even if it was nonnegotiable and its transfer was operative upon the theory of assignment, not of endorsement, and the title acquired by the plaintiff was subject to the defendant's equities, yet the defendant offered no evidence and proved no equity. On the contrary it impliedly treated its defense as dependent upon a determination of the matters involved in the issue submitted, and consented to the plaintiff's recovery of the amount claimed if the jury should answer the issue in favor of the plaintiff. Upon the undisputed evidence the merits of the case are with the plaintiff whether the certificate be negotiable or nonnegotiable, and in our opinion the judgment should not be disturbed. Norton on Bills and Notes, 14; *Jackson v. Love,* 82 N. C., 405; *Bank v. Bynum,* 84 N. C., 24; *Havens v. Potts,* 86 N. C., 31; *Kiff v. Weaver,* 94 N. C., 274; *Thompson v. Osborne,* 152 N. C., 408.

We find no error entitling the defendant to a new trial.

No error.

VIRGINIA-CAROLINA CHEMICAL CO. v. F. H. TURNER ET AL., TRADING AS FARMERS' SUPPLY CO.

(Filed 12 November, 1925.)

1. Courts—Jurisdiction—Constitutional Law—Statutes.

A court created by statute may not pass upon the constitutionality of the statute of its creation; and the jurisdiction being derivative, the Superior Court may not do so on appeal therefrom, or thus have the matter determined in the Supreme Court upon further appeal.

2. Courts—Statutes—Process—County Courts.

Where a county court is created by a legislative enactment, declaring that its process shall run as process issuing out of the Superior Court, which was by reading the summons to the defendant, an exception by

defendant to the legality of such service for failure to leave a copy with him is untenable. The provisions of ch. 520, Public Laws of 1915, amended by ch. 92, Public Laws, Extra Session, 1921, are not applicable in such instances.

APPEAL by defendant from FORSYTH Superior Court. *Finley, J.*

Motion by the named defendant to set aside a judgment of the Forsyth County Court. From a judgment of the Superior Court, affirming the judgment of the Forsyth County Court, denying defendant's motion and rendering judgment against the defendant and his surety on his supersedeas bond, the named defendant appealed. Affirmed.

The facts found by the Forsyth County Court are as follows:

"That summons was issued out of this court on 31 October, 1923, against the defendant, F. H. Turner, returnable to a term of this court commencing the 11th Monday after the first Monday in September, 1923, it being the 19th day of November, 1923, and that summons was served upon the defendant, F. H. Turner, on 5 November, 1923, by reading the said summons to the said defendant; that the plaintiff filed a duly verified complaint against this defendant and others on 14 November, 1923, setting forth a cause of action and demanding judgment in the sum of $1,782.36, with interest thereon from 1 May, 1923; that the defendant, F. H. Turner, has failed to answer or otherwise plead; that judgment was entered by this court on Monday, 11 May, 1925, against the defendant, F. H. Turner, for the sum of $1,782.36, with interest thereon from 1 May, 1923; that the said defendant did not file before time for answering expired, and has never filed a motion to remove this cause for trial to the Superior Court of Ashe County; that the said defendant was at the time of the commencement of this action, and now is, a resident of Ashe County, and that said summons was issued out of this court under the seal of this court to Ashe County, where the same was served by the sheriff of Ashe County by reading the summons to this defendant; that no defendant named in said summons was a resident of Forsyth County; that the plaintiff is a corporation, organized under the laws of the State of New Jersey, with a principal place of business in Winston-Salem, North Carolina."

Swink, Clement & Hutchins for plaintiff.
W. R. Bauguess for defendant.

VARSER, J. The first attack on the validity of the default judgment against F. H. Turner is that chapter 520, Public-Local Laws, creating the Forsyth County Court, is unconstitutional, and, therefore, the court itself is a nullity.

This motion to declare itself out of existence was addressed to the Forsyth County Court. This presents an anomalous situation. A court,

as such, is asked to declare that it has no legal existence. This cannot be done. The court would first have to decide that it is a court in order to entertain the motion. Then, when the motion is considered, having already determined that it was a court, it would pass again on its own existence; and if the motion is allowed, it would then undo itself and pass out of existence by virtue of its own ruling. Its ruling would be invalid if the act creating it is unconstitutional and the decision would not be, in any sense, judicial.

Ex nihilo nihil fit is still a maxim that knows no exception. This self-evident maxim was first applied in this State by *Associate Justice Henderson* in *Beard v. Cameron*, 7 N. C., 181, and followed in *S. v. Hall*, 142 N. C., 710; *S. v. Wood*, 175 N. C., 815; *S. v. Simmerson*, 177 N. C., 546. The only case that seems to militate against this position is *S. v. Shuford*, 128 N. C., 588. This case has not been followed, and has only been cited twice: *St. George v. Hardie*, 147 N. C., 88, and *S. v. Wood, supra*. In each of these citations it was distinguished. The decision is plainly correct as a substantive proposition, but as to the power of the court to entertain the motion, it is not approved.

The jurisdiction of the Superior Court of Forsyth County is derivative in appeals from the county court; therefore, the question of the constitutionality of chapter 520, Public-Local Laws 1915, was not properly presented to the Superior Court of Forsyth, nor to this Court.

Courts never anticipate a question of constitutional law before the necessity of deciding it arises. They never formulate a rule broader than required by the precise facts presented. The admitted power of the courts to determine the constitutionality of acts of the Legislature will never exert itself unless clearly necessary. *Person v. Doughton*, 186 N. C., 723, 725; *Liverpool Steamship Co. v. Commissioners of Emigration*, 113 U. S., 39, 28 L. Ed., 900; *Comrs. v. State Treasurer*, 174 N. C., 148; *Mass. v. Mellon*, S. C. R., 597.

This act creating a special court with full provisions for a jury and the docketing of its judgments in the Superior Court of Forsyth County, and a system of appeals to the Superior Court, is contained in Public-Local Laws 1915, ch. 520; Public-Local Laws 1921, ch. 517; Public Laws 1923, ch. 150, and in two acts of the 1925 General Assembly designated as S. B. 186, H. B. 119, and S. B. 1094, H. B. 1299. This court is functioning adequately and satisfactorily to the people of Forsyth County.

The defendant contends that the summons was not legally served in that it was "read" and no copy thereof was delivered to him by the sheriff of Ashe County. This makes proper service of summons issuing out of Forsyth County Court. When ch. 520, Public-Local Laws

1915 was enacted (6 March, 1915), the service of summons within the contemplation of section 7, thereof, was "by reading." Revisal, 439. The change of the manner of service of summons issuing from the Superior Court from "reading" to "delivering a copy" was effected by Public Laws, Extra Session, 1921, ch. 92, and expressly limited the change to "all civil actions in the Superior Court." Public Laws 1923, ch. 216, does not apply to the "Forsyth County Court" because, by its very terms, this act applies only to courts established under its provisions.

The service of summons *in Ashe County,* by the sheriff of Ashe County, is not invalid, for chapter 520, Public-Local Laws 1920, sec. 9, expressly declares that the process of the Forsyth County Court "shall run as process issuing out of the Superior Court," *i.e.,* anywhere in the State.

The service was proper and the county court had jurisdiction. *Piano Co. v. Newell,* 177 N. C., 533; *Guano Co. v. Supply Co.,* 181 N. C., 210. If the defendant was not willing for the trial to take place in the "County Court" in Forsyth County, it was his duty to move for a removal to Ashe County. *Piano Co. v. Newell, supra.*

It was a question of venue only, and not a question of jurisdiction, and the motion to set aside a judgment will not avail the defendant.

This disposes of the grounds assigned to support the defendant's motion.

The judgment appealed from is

Affirmed.

L. J. McDANIEL v. ATLANTIC COAST LINE RAILWAY.

(Filed 12 November, 1925.)

Evidence—Prima Facie Case—Burden of Proof—Instructions—Appeal and Error.

Where the plaintiff's evidence makes out a prima facie case, it is only sufficient to take the case to the jury to determine the issue, and for them to sustain a verdict thereon in the plaintiff's favor, and an instruction that it shifts the burden of proof to the defendant, is reversible error.

APPEAL by defendant from *Finley, J.,* at September Term, 1925, of FORSYTH.

Civil action tried in the Forsyth County Court, resulting in a verdict and judgment for plaintiff. On appeal to the Superior Court, sitting as an appellate court, the judgment of the county court was affirmed. From this judgment defendant appeals, assigning error.

Swink, Clement & Hutchins for plaintiff.

Thomas W. Davis, W. A. Townes, Craige & Craige and Parrish & Deal for defendant.

Stacy, C. J. Plaintiff brings this action to recover damages for an alleged negligent injury to a carload of oranges shipped on 8 February, 1921, from Zolfo, Fla., to New Bern, N. C., and routed over the defendant's lines. Upon denial of liability and issues joined in the Forsyth County Court, there was a verdict and judgment in favor of the plaintiff for $300.00 with interest from 14 February, 1921. On appeal to the Superior Court of Forsyth County, sitting as an appellate court (chap. 520, Public-Local Laws 1915), the judgment of the county court was upheld. The case comes to us for a review of the judgment of the Superior Court affirming the judgment of the county court.

We deem it unnecessary to consider more than one exception. There was error in the charge of the trial court in regard to the burden of proof. The following excerpts constitute the basis of two of the defendant's exceptive assignments of error:

1. "If you find by the greater weight of the evidence that the oranges were delivered in good condition and arrived in a damaged condition, then the burden of proof shifts to the defendant."

2. "Now, gentlemen of the jury, I have told you about the burden of proof. I again call your attention to that. If you find by the greater weight of the evidence that this fruit was received in good condition and that it arrived in bad condition, then the plaintiff would have made out a prima facie case, but a prima facie case can always be rebutted. It is for you to say whether or not the defendant, the burden of proof having shifted to the defendant, as to whether or not the defendant has rebutted this prima facie case of the plaintiff."

These instructions, it must be conceded, as it was on the argument, are in direct conflict with what has been said in a number of recent cases, notably *Dickerson v. R. R., ante,* p. 300; *Ferrell v. R. R., ante,* 126; *Hunt v. Eure,* 189 N. C., 482; *Speas v. Bank,* 188 N. C., 524; *Cotton Oil Co. v. R. R.,* 183 N. C., 95; *White v. Hines,* 182 N. C., 288.

The burden of proof in a civil action is not shifted when the plaintiff makes out a *prima facie* case, nor is the defendant required to offer evidence to rebut a *prima facie* showing, or to escape liability on such a showing. A *prima facie* case means, and means no more, than evidence sufficient to justify, but not to compel, an inference of liability, if the jury so find. It furnishes evidence to be weighed, but not necessarily to be accepted, by the jury. It simply carries the case to the jury for determination, and no more. "A *prima facie* showing merely takes the case to the jury, and upon it alone they may decide with the actor or they may decide against him, and whether the defendant shall go

forward with evidence or not is always a question for him to determine."—*Varser, J.*, in *Hunt v. Eure, supra.* See, also, *Austin v. R. R.*, 187 N. C., 7; *McDowell v. R. R.*, 186 N. C., 571; *Page v. Mfg. Co.*, 180 N. C., 330; *S. v. Wilkerson,* 164 N. C., 431; *Shepard v. Tel. Co.*, 143 N. C., 244.

Plaintiff says the above instructions were corrected in other portions of the charge, and, therefore, they should not be held for error under the principle that the charge is to be taken and examined as a whole, or at least the whole of what was said regarding any special phase of the case or the law, and, if thus considered, the charge in its entirety appears to be correct, slight deviations in detached portions will not be held for reversible error. *Exum v. Lynch,* 188 N. C., p. 397; *Cherry v. Hodges,* 187 N. C., 368; *In re Mrs. Hardee, ibid.,* 381. Such is undoubtedly the correct rule, as established by our decisions, but we do not find that these instructions were corrected in other portions of the charge. Contrariwise, instead of withdrawing or correcting these instructions in other portions of the charge, as contended by the plaintiff, they seem to have been accentuated, as witness the following:

"If you find that the oranges, when received by the railroad, were in good condition, that on their arrival at New Bern they were in a damaged condition, then the burden is on the defendant to rebut the *prima facie* case of the plaintiff if it desires to escape liability, by introducing evidence tending to show that damage to the oranges was not the proximate result of the defendant's negligence."

For error in the charge, touching the burden of proof, the cause should have been remanded to the Forsyth County Court for another hearing. There was error in upholding the validity of the trial. Let this be certified.

Error.

LAURA S. McGEHEE v. J. W. McGEHEE, EXECUTOR OF HENRY W. McGEHEE, DECEASED, J. W. McGEHEE, HENRY RICHARD McGEHEE, NINA HEGE AND IRENE HEGE, HEIRS AT LAW OF NANNIE McGEHEE HEGE, MAMIE McGEHEE McANNALLY AND HER HUSBAND, WILLIAM McANNALLY, SALLIE FOY McGEHEE, IRENE McGEHEE, HENRY WINFRED PRICE, T. A. PRICE, RICHARD PRICE, BESSIE PRICE, AND MARTHA PRICE.

(Filed 12 November, 1925.)

1. Appeal and Error—Judgments—Second Appeal.

Where on a former appeal the court below has been reversed, but leaving unpresented the form of the judgment to be rendered, the law as decided by the court as therein applicable should be followed and considered as determinative; but errors alleged in the judgment otherwise may again be appealed from.

2. Appeal and Error—Former Appeal—Issuable Matters—Judgment.

While the trial judge should apply the law to the case as decided on a former appeal therein, it is reversible error for him to sign a judgment without submitting to the jury determinable matters left open for their consideration.

Appeal by John W. McGehee, Executor, from *Schenck, J.*, at August Term, 1925, of Guilford.

From a judgment entered on the certificate of the opinion of this Court, adjudging "that the plaintiff, Laura S. McGehee, have and recover of the defendant, J. W. McGehee, as executor of the last will and testament of Henry W. McGehee, deceased, the sum of $20,000 with interest from 8 September, 1920, until paid," the defendant, John W. McGehee, executor, appeals.

King, Sapp & King and Swink, Clement & Hutchins for plaintiff.

Manly, Hendren & Womble and J. R. Joyce for defendant, J. W. McGehee.

Stacy, C. J. At the close of the evidence, on the trial of this cause, had at the December Term, 1924, it was agreed between counsel for plaintiff and defendants that the only question then for decision was whether or not the principle of equitable compensation, as sometimes engrafted on the primary doctrine of election, was applicable to the facts of the instant case. The trial court was of the opinion that it was and rendered judgment accordingly. This was reversed on plaintiff's appeal, but without any direction as to what judgment should be entered. *McGehee v. McGehee,* 189 N. C., 558. Hence, when the case was called again at the August Term, 1925, it stood for trial on the issues of fact raised by the pleadings, just as if no former trial had taken place, the law, of course, as announced by this Court in its opinion, to be applied in the case. *McMillan v. Baker,* 92 N. C., 111; *Ashby v. Page,* 108 N. C., 6; *Jones v. Swepson,* 94 N. C., 700.

The agreement of counsel on the original hearing did not go to the extent and scope of the judgment to be entered, and this was not considered by us on the first appeal. His Honor, therefore, erred in rendering what amounted to a judgment on the pleadings, without disposing of the issuable questions of fact raised thereby and which relate to the extent and scope of the judgment to be entered. Besides, the judgment awarded was such as a creditor would be entitled to demand (*Johnson v. Powers,* 139 U. S., 156), while the plaintiff is claiming as a legatee under the will. *University v. Borden,* 132 N. C., 477.

It may be well to note that an executor, appointed in this jurisdiction, is charged with the duty of administering the estate rightfully

coming into his possession here, according to the provisions of the will as interpreted by the courts of this State. *Stacy v. Thrasher,* 6 How., 44. An executor is one named by the testator and appointed to carry the will into effect after the death of the maker, and to dispose of the estate according to its tenor. *Kellogg v. White,* 169 N. Y. S., 989; *Shufeldt v. Hughes,* 104 Pac. (Wash.), 253.

The plaintiff is entitled to take her legacy under the will, "in lieu of her dower rights," and it is the duty of the executor to pay it, or apply to its payment such funds as may come into his hands available for that purpose, and to render an accounting of his executorship. *Vaughn v. Northrup,* 15 Pet., 1. The method of procedure, including the proper form of judgment in such cases, was considered in *York v. McCall,* 160 N. C., 276, construing C. S., 147. See, also, C. S., 155 and 156.

Let the cause be remanded, to the end that further proceedings may be had as the law directs and the rights of the parties require.

Error.

MRS. LILLIE WILLIAMS v. ARTHUR WILLIAMS, ADMINISTRATOR OF J. A. WILLIAMS, JR.

(Filed 12 November, 1925.)

1. Judgments—Clerks of Court—Statutes.

The judgments of the clerk of the court rendered within the authority given him by statute, C. S., 515, are judgments of the Superior Court, and have the same effect as those rendered by the judge, and when not appealed from, are final and conclusive.

2. Same—Superior Courts—Pleadings—Amendments—Jurisdiction.

The Superior Court judge in term has no authority to allow an amendment to the complaint, in an action which has proceeded to final judgment before the clerk of the Superior Court, rendered within his statutory jurisdiction, C. S., 515, and not appealed from.

3. Same—Appeal and Error—Motions—Notice.

If the plaintiff desires to amend his complaint after an adverse opinion of the Supreme Court on appeal affirming the order of the clerk of the Superior Court in dismissing the action, he must give notice thereof within three days after the opinion has been received by the Superior Court. C. S., 515.

APPEAL by defendant from ALLEGHANY Superior Court. *Schenck, J.*

Motion by plaintiff to set aside judgment of the clerk, and to allow plaintiff to file an amended complaint. Motion allowed and defendant appeals. Reversed.

The defendant assigns error as follows: (a) That the judgment of the clerk dismissing the action was regular and in compliance with the statute (C. S., 515); and (b) no appeal having been taken from the clerk's judgment the cause had been finally adjudicated and the parties were not *coram judice;* (c) that the judgment of the clerk was in effect a denial of plaintiff's right to amend.

The exception to the judgment is the only exception.

T. C. Bowie, R. F. Crouse for plaintiff.
Doughton & Higgins for defendant.

VARSER, J. This cause was considered by this Court in *Williams v. Williams,* 188 N. C., 728. The opinion of this Court was certified to the Superior Court of Alleghany County on 7 January, 1925. On Monday, 27 April, 1925, on defendant's motion, the clerk entered judgment dismissing this action as directed in C. S., 515, and in accordance with the opinion from this Court. There was no exception to this judgment and no appeal therefrom. At May Term, which began Monday, 4 May, 1925, plaintiff moved for leave to amend his complaint. No motion appears of record to set aside the clerk's judgment of dismissal, either on the grounds of irregularity, or under C. S., 600. Under C. S., 515, the plaintiff, within ten days after the opinion of the Supreme Court has been received by the Superior Court, could have moved, upon three days notice, for leave to amend the complaint. This was not done. In obedience to the ruling of this Court, and in compliance with the provisions of C. S., 515, the judgment was entered dismissing the action. This put an end to the litigation in the Superior Court. Therefore the Superior Court in term time was without power to set aside the judgment in order to allow an amendment to the complaint, and there was no pending cause in which an amended complaint could be filed. Judgments rendered by the clerks of the Superior Court pursuant to C. S., 515, are judgments of the Superior Court and have all the strength and virtue of judgments rendered by the judge thereunder. *Caldwell v. Caldwell,* 189 N. C., 805. In *Caldwell's case,* the practice in regard to relief from judgments entered by clerks is clearly indicated.

To the end that this action be dismissed let the judgment appealed from be

Reversed.

J. E. HARRIS v. SEABOARD AIR LINE RAILWAY COMPANY.

(Filed 18 November, 1925.)

1. **Contracts — Bargain and Sale — Title-Retaining Contracts — Chattel Mortgages.**

A contract for the sale of a chattel-retaining title in the vendor to secure the payment of the purchase price or a part thereof, is in the nature of a chattel mortgage.

2. **Same—Bailment.**

Where the seller gives possession to the purchaser under a title-retaining contract of sale of a chattel, the relation of bailor and bailee arises, with the distinction that the bailee has the further right or interest in the chattel, of making the payment according to the terms of the contract and acquiring the title.

3. **Same —Mortgagor in Possession — Actions — Compromises — Principal and Agent.**

A mortgagor in rightful possession of the chattel may maintain an action for damages thereto by the negligence of a *tort-feasor*, or compromise and settle the damages out of court, and having the implied authority to so act for the mortgagee or bailor, the latter may not thereafter maintain an action against the *tort-feasor* for the same tort.

4. **Same—Registration—Settlement.**

A *tort-feasor* whose negligence has damaged a chattel in the rightful possession of the mortgagor, is neither a purchaser nor creditor within the contemplation of our registration laws, C. S., 2576, 3311, 3312, and an action may be maintained against him for the consequent damage either by the mortgagor or mortgagee, and a settlement with one will preclude a recovery by the other.

APPEAL by defendant from *Daniels, J.*, at Third March Term, 1925, of WAKE. Reversed.

From judgment, upon statement of facts agreed, that plaintiff recover of defendant the sum of $250, with interest thereon from 4 November, 1921, defendant appealed.

Winston, Winston & Brassfield for plaintiff.
Murray Allen for defendant.

CONNOR, J. Judgment herein was rendered upon statement of facts agreed, as follows:

"That some time prior to 18 September, 1919, the plaintiff sold to W. M. Richards one five-passenger Ford automobile under a title-retaining contract, recorded in the office of the register of deeds of Granville County, on 20 October, 1919, in Book No. 137, at page 448, and

in the office of the register of deeds of Wake County, on 21 February, 1920, in Book No. 360, at page 32, a copy of said contract being attached hereto and made a part of this case agreed, and the amount due plaintiff on said title-retaining contract was $300, with interest from 18 September, 1919.

"The said Ford automobile was delivered to W. M. Richards at the time said contract was made, and he continued in possession thereof until about 23 October, 1921. That on or about 23 October, 1921, the said automobile was being driven by W. M. Richards, and was negligently injured and damaged by one of the defendant's trains at a railroad crossing between Neuse and Wake Forest, N. C. That on 4 November, 1921, the defendant paid W. M. Richards the sum of $250 for the damage to the said automobile and W. M. Richards executed to defendant a release, a copy of which is hereto attached and made a part of this case agreed.

"Upon the foregoing facts agreed, the plaintiff contends that he is entitled to recover the sum of $250, with interest thereon from 4 November, 1921. The defendant contends that plaintiff is not entitled to recover any sum whatsoever."

The note and contract executed by W. M. Richards to plaintiff, trading under the name and style of Creedmoor Auto Company, dated 18 September, 1919, at Creedmoor, N. C., is in words and figures as follows:

"$400.00.

"On the 15th day of November, 1919, I promise to pay to Creedmoor Auto Company, or order, the sum of four hundred dollars, with interest thereon from maturity, at the rate of six per cent per annum. Payments of $25.00 to be made monthly until paid in full.

"This note is given for part of the purchase price of an automobile manufactured by Ford Motor Co., being No....., with motor No. 625330, this day purchased by W. M. Richards of said Creedmoor Auto Company, and the title to said automobile is hereby retained by said Creedmoor Auto Company, until this note and interest is paid in full.

"And upon default in the payment of this note when due, the said Creedmoor Auto Company is hereby authorized to take possession of the said automobile, and sell the same, by public auction, for cash, first giving twenty days notice of the time and place of such sale, the proceeds of such sale to be applied to the payment of this note, the interest thereon, and the cost of the sale, and the surplus, if any, to be paid to W. M. Richards.

"Witness my hand and seal, this 18th day of September, 1919.

"(Signed) W. M. RICHARDS (Seal)."

The release executed by W. M. Richards to the defendant, is as follows:

"For and in consideration of the sum of two hundred and fifty dollars, to me paid, the receipt of which is hereby acknowledged, and for no other consideration whatsoever, I, W. M. Richards, do hereby release and forever discharge the Seaboard Air Line Railway Company, and any and all railroads, owned, leased, operated or controlled by it, and its successors, from all claims and causes of action for or by reason of all injuries of whatsoever nature, including especially to damage and destruction to Ford (five passenger) auto, property of W. M. Richards, also any and all personal injuries and claims received by me on or about the 23rd day of October, 1921, at or near Smith Crossing, National Highway, between Neuse and Wake Forest, N. C., Wake County, North Carolina.

"In witness whereof, I have hereunto set my hand and seal this 4th day of November, 1921. (Signed) W. M. RICHARDS (Seal)."

Defendant excepted to the judgment herein, and assigns same as error. It does not deny liability for damages, resulting from injuries to said automobile, caused by its negligence; it is conceded that the amount of such damages is $250.00; in defense of the action brought by plaintiff, mortgagee, to recover such sum, defendant pleads payment of said sum to W. M. Richards, mortgagor in possession of the automobile, with the consent of plaintiff, at time same was injured; defendant relies upon the settlement with and release by W. M. Richards as a bar to plaintiff's right to recover.

The question, therefore, presented by this appeal, is whether a settlement made in full for all damages to a chattel by the *tort-feasor* with the mortgagor in possession, using the chattel with the consent of the mortgagee, is a bar to the action to recover such damages by the mortgagee, whose mortgage is duly recorded at the time the chattel was injured. This question has not been heretofore presented to this Court.

The relationship between plaintiff and W. M. Richards, with respect to said automobile, by virtue of the contract which provides that the title to the automobile sold by plaintiff to W. M. Richards is retained by plaintiff until the note given in part payment of the purchase price has been paid in full, is that of mortgagee and mortgagor; the title-retaining contract is to all intents and purposes a chattel mortgage. *Sloan Bros. v. Sawyer-Felder Co.*, 175 N. C., 657; *Piano Co. v. Kennedy*, 152 N. C., 196; *Hamilton v. Highlands*, 144 N. C., 282; *Puffer v. Lucas*, 112 N. C., 379.

The legal title to the automobile remained in plaintiff, as mortgagee, from the date of the contract to the date of its injury by defendant; this title drew to it the right of possession, certainly after default in the payment of the note, when plaintiff was expressly authorized by the contract to take possession of the automobile and sell the same. It has been held by this Court that a mortgagee, both before and after default in the payment of the note or indebtedness secured thereby, has the right of possession of the mortgaged property, where there is no express provision or necessary implication to the contrary. By express provision of the contract, the right to possession was in plaintiff at time of injury. *Johnson v. Yates,* 183 N. C., 24; *Hamilton v. Highlands, supra,* 280; *Satterthwaite v. Ellis,* 129 N. C., 67; *Moore v. Hurtt,* 124 N. C., 28; *Hinson v. Smith,* 118 N. C., 503.

Plaintiff, the owner of the legal title, and by reason thereof, entitled to possession of said automobile, permitted same to be and remain in the possession of W. M. Richards, his mortgagor; W. M. Richards, with the consent of plaintiff, was driving the automobile at the time it was injured by the negligence of defendant; his possession was, therefore, rightful and lawful. The rights and liabilities of said mortgagor, in possession of the mortgaged property, after default in the payment of the note, with the permission and by the consent of the mortgagee are those of a bailee. *Chicago R. I. & P. Ry. Co. v. Earl,* (Ark.), 181 S. W., 925. 5 R. C. L., p. 464, note 20.

It has been held by this Court, in an opinion written by *Justice Brown,* in *R. R. v. Baird,* 164 N. C., 253, that where a third party has deprived a bailee of the possession of the property bailed, or has injured it by his negligence, the bailee may recover the whole value of the property, unless the bailor interposes by a suit for his own protection, and that he will hold the excess beyond his special interest in trust for the bailor. 5 Cyc., 223, sec. 8; 6 C. J., 1168, sec. 184. It has been uniformly held that the bailee has a right of action against a third party, who by his negligence causes the loss of or an injury to the bailed articles, and this right has been held to be the same, even though the bailee is not responsible to the bailor for the loss. 5 Cyc., 210; 6 C. J., 1149, sec. 111. 3 R. C. L., p. 138, sec. 62.

It would seem that if a bailee, who has possession only of the property, the title to which remains in the bailor, may maintain an action to recover damages for injury to the property, caused by the negligence of a third party, a mortgagor, in possession, after default, with the consent and by the permission of the mortgagee, may likewise maintain the action. The interest of a mortgagor in the property mortgaged is greater than that of a bailee in the property bailed. The contract of bailment does not contemplate any change in the legal title to the prop-

erty bailed—it remains in the bailor. The mortgagee's legal title, however, is held subject to the equity of redemption in the mortgagor; upon payment of the note, or the performance of the condition by the mortgagor, the mortgagee's title is divested and passes to the mortgagor.

"The mortgagor in lawful possession, whether by the terms of the mortgage or otherwise, has the right to protect his possession against third parties by appropriate legal remedies, because he is regarded as the owner of the property mortgaged as against all persons except the mortgagee, and it is not necessary in such actions to join the mortgagee. Hence, the mortgagor may maintain an action to recover for damages to the property caused by the negligence of a third person." 11 C. J., 598, sec. 300.

"The mortgagor may, even after default, maintain any action necessary to protect the property against wrongdoers. Although on default, the legal title and right to possession are in the mortgagee, yet as between third persons and the mortgagor who is suffered to remain in the possession of the property, the latter has the right of possession and such a special interest that he may maintain such actions as are necessary to protect his possession and his special right." 5 R. C. L., 474.

The foregoing statement of the law applicable is sustained by the Supreme Court of Arkansas in an opinion written by *Justice Wood,* in *Chicago R. I. & P. Ry. Co. v. Earl,* 181 S. W., 925. It is there said: "Since the mortgagor in possession has the right to maintain a suit for damages against the wrongdoer for injury to the property, it follows as the logical, if not necessary, corollary of this doctrine that the mortgagor would have the right to settle with the wrongdoer without suit; also that the wrongdoer, having the right to settle, and having settled with the mortgagor, would not be liable over to the mortgagee. This rule is in accord with the commendable policy of compromising and adjusting differences without going to law." See, also, *Wilkes v. Southern Railway,* 85 S. C., 346, 67 S. E., 292. This case is reported with full annotations in 137 Am. St. Rep., 890. After reviewing many authorities, the annotator says: "A mortgagor's right to maintain suit for injury or destruction of the mortgaged chattel due to negligence of the defendant has never been seriously denied."

Either the mortgagee or the mortgagor of personal property, may sue to recover the property or damages for its conversion, injury or destruction; as between them, the right of the mortgagee to the property or to the recovery is superior to that of the mortgagor, but only one cause of action arises from the wrongful act of the wrongdoer; a settlement by him with either the mortgagee or mortgagor, in the absence of fraud or collusion, is a bar to the action of the other. The sum paid or recovered as damages is held in trust to be applied according to the respec-

tive rights of mortgagee and mortgagor; these rights may be enforced by appropriate legal remedies. *Wilkes v. Southern Railway, supra; Donnell v. Deering,* (Me.), 97 At., 130. *R. R. v. Baird, supra;* Blackstone, Book II, chap. 30, p. 453.

The rule with respect to the right of action in the mortgagee or mortgagor is the same as in the case of bailor and bailee; namely, "either the general owner of the property or one having a special interest in it, can maintain trespass or case for an injury to it, or trover for conversion of it. But a judgment recovered by either is a bar to a suit by the other for the same cause of action, and it would seem that a voluntary payment of damages by the defendant to one would be a bar to a suit by the other." Jones on Chattel Mortgages, sec. 477a and cases cited.

Registration of the contract between plaintiff and W. M. Richards did not affect the right of the latter, as mortgagor or vendee in possession, to maintain an action to recover damages for the injury to the automobile, caused by the negligence of defendant; nor did it affect the right of defendant to settle with W. M. Richards, and by payment of such damages to him to be discharged from further liability on the cause of action which accrued against it because of its wrongful act. Registration affects the rights only of purchasers for value from, or creditors of the mortgagor; as against them, the mortgage or conditional sale is void until registered, as provided by statute. C. S., 2576, 3311, 3312. The title of the mortgagee or vendor is valid from the date of registration, as against purchasers for value or creditors; a *tort-feasor* is neither a purchaser for value nor a creditor.

It was held by this Court in *Johnson v. Yates,* 183 N. C., 24, that a mechanic, who repaired an automobile in the lawful possession of the mortgagor, acquired, under our statute, C. S., 2435, a lien upon the automobile for the reasonable value of the repairs, and that such lien was superior to the title of the mortgagee whose mortgage was duly recorded. The mechanic's right to a lien for the reasonable value of his repairs is not affected by the registration of the mortgage; so we must hold that one, who by his wrongful act, injures the mortgaged property, in the lawful possession of the mortgagor, and against whom a cause of action accrues for damages resulting from his wrongful act, may in good faith pay the amount of such damages to the mortgagor, and that such payment is a full discharge and satisfaction of the cause of action not only of the mortgagor, but also of the mortgagee. A release by the mortgagor, in possession at the time the cause of action accrues, is a bar to an action by the mortgagee for damages arising from the same cause of action. It would be manifestly unjust to hold that a *tort-feasor* is liable to damages resulting from the same wrongful

act to both mortgagee and mortgagor. Only one cause of action arises from the wrongful act; payment of damages to one who may maintain an action to recover same is and ought to be a full satisfaction of liability to another who might have recovered upon the same cause of action. As said by *Justice Hydrick* in *Wilkes v. Southern Railway, supra,* "It would, indeed, be an anomaly to hold that after condition broken, mortgaged chattels might be taken from the possession of the mortgagor, or injured or destroyed by any trespasser and that the mortgagor could have no redress except through the mortgagee." When the mortgagor has received payment for the damages, he holds the same in trust for his mortgagee who may enforce the trust by appropriate proceedings.

The assignment of error must be sustained and the judgment herein Reversed.

ADA L. MABE, ADMX., ET AL. v. CITY OF WINSTON-SALEM.

(Filed 18 November, 1925.)

1. Government—Municipal Corporations.

Incorporated cities and towns within the powers given them are local governmental agencies of the State, and in the absence of statutory provision to the contrary, may not be sued for damages for the negligence of their agents and employees while discharging governmental functions.

2. Same — Torts — Negligence — Principal and Agent — Waterworks—Statutes.

A municipality is in the exercise of its governmental powers in maintaining a fire department, and an action for damages for failure to sooner extinguish a fire on the property of the owner thereof by reason of having permitted its street at the fire hydrant there to become obstructed and remain so, is not maintainable without statutory provision making them so, their exemption as to furnishing a sufficient supply of water, etc., being expressly stated in the statute. C. S., 2807. *Gorrell v. Water Co.,* 128 N. C., 375, and like cases, distinguished by STACY, C. J.

3. Same—Proximate Cause.

Where in an action against a city to recover damages for a fire loss alleged to have been caused by permitting obstructions to remain at its fire hydrants, the proximate cause is the failure of the city to put out the fire for which no recovery may be had, under C. S., 2807.

APPEAL by plaintiff from *Schenck, J.,* at May Term, 1925, of FORSYTH.

Civil action to recover damages for an alleged negligent placing of curbstones or rocks around a fire-plug or hydrant, in violation of a city ordinance, whereby fire department of the city of Winston-Salem was unable, on 23 March, 1920, to save the plaintiff's house from being

destroyed by fire, which, it is alleged, it could and would have done but for such negligent obstruction.

The alleged obstruction was placed around the hydrant in question by agents and employees of the defendant city while paving a street in the vicinity of plaintiff's house, and it was permitted to remain there for six or eight months prior to the time of the fire.

There was only a small blaze on the top of plaintiff's house at the time of the arrival of the fire department, but by reason of said obstruction, some ten or fifteen minutes were consumed in removing same, before any connection with the hydrant could be made, and, in the meantime, the fire assumed uncontrollable proportions and resulted in the destruction of plaintiff's house.

This action was instituted by J. W. Mabe, the owner of the house, who died *pendente lite,* and his administratrix has been substituted as party plaintiff. The George Washington Fire Insurance Company was adjudged to be a necessary party by order of court.

At the close of plaintiff's evidence, and on motion of defendant, there was a judgment as of nonsuit, from which plaintiff appeals.

John C. Wallace, Richmond Rucker and Hastings, Booe & DuBose for plaintiff, Ada L. Mabe.

Craige & Craige and F. L. Webster for plaintiff, George Washington Fire Insurance Company.

Parrish & Deal for defendant.

STACY, C. J., after stating the case: It is conceded that the defendant, city of Winston-Salem, which owns a municipal light and waterworks system, and operates the same in its governmental capacity, cannot be held liable in damages for a failure to furnish a sufficient supply of either water or light. *Howland v. Asheville,* 174 N. C., 749; *Harrington v. Greenville,* 159 N. C., 632.

C. S., 2807, appearing in the chapter on "Municipal Corporations," is as follows: "The city may own and maintain its own light and waterworks system to furnish water for fire and other purposes, and light to the city and its citizens, but shall in no case be liable for damages for a failure to furnish a sufficient supply of either water or light. And the governing body shall have power to acquire and hold rights of way, water rights, and other property, within and without the city limits."

It is also conceded that the defendant, in the absence of statutory provision to the contrary, is not liable for any damage occasioned by the negligence of its fire department. *Mack v. Charlotte,* 181 N. C., 383; *Peterson v. Wilmington,* 130 N. C., 76; note, 9 A. L. R., 143.

For the purposes of its creation, a municipal corporation is an agency of the State government, possessing powers, within its limited scope of authority, which, in their nature, are either legislative or judicial, and may be denominated governmental or public. The extent to which it may be proper to exercise such powers, as well as the mode of their exercise by the corporation, within the limits prescribed by the law creating them, are of necessity entrusted to the judgment, discretion and will of the properly constituted authorities to whom they are delegated. And being public in their nature, the corporation is not liable either for a failure to exercise them or for errors committed in their exercise, unless expressly made so by statute. *Kistner v. Indianapolis,* 100 Ind., 210. A city, therefore, in the absence of statutory provision to the contrary, does not by building and operating a system of waterworks or by maintaining a fire department, thereby enter into any contract with, or assume any implied liability to, the owners of property to furnish means or water for the extinguishment of fires, and for the breach of which an action in damages may be maintained. A city may not be sued for loss sustained by fire, where the wrongful act charged was neglect in cutting off water from a hydrant, but for which the fire might have been extinguished, or in failing to keep a reservoir in repair whereby the supply of water became inadequate, or because the pipes were not sufficient or out of order, or because the officers and members of the fire department were negligent in the performance of their duties. 3 Dill. Mun. Corp., p. 2300. The extinguishment of fires is a function which a municipal corporation undertakes in its governmental capacity, and in connection with which, in the absence of statutory provision to the contrary, it incurs no civil liability, either for inadequacy in equipment or for the negligence of its employees. 19 R. C. L., 1116; *Scales v. Winston-Salem,* 189 N. C., 469, and cases there cited.

The principle announced in *Gorrell v. Water Supply Co.,* 124 N. C., 328, *Fisher v. Water Co.,* 128 N. C., 375, *Jones v. Water Co.,* 135 N. C., 544, and *Morton v. Water Co.,* 168 N. C., 582, to the effect that, when a water company contracts with a city to furnish, at all times, a supply of water sufficient for the protection of the inhabitants and property of the city against fire, the company must answer in damages for loss by fire resulting from its failure to perform its contract, has no application to the facts of the present record. Those cases rest upon the doctrine of contracts voluntarily assumed and wrongfully breached, but no such case is presented here. And it may be observed that in an action, based on such a contract, the inquiry is whether, considering the purpose, character and capacity of the waterworks, and all the attendant circumstances and agencies, the fire, which destroyed the plaintiff's property,

could and would have been extinguished with less damage if the contracting defendant had complied with the terms of its agreement. *Lumber Co. v. Water Supply Co.,* 89 Ky., 341.

Appreciating the force and effect of the decisions holding that a fire department, owned and operated by a municipal corporation, belongs to the public or governmental branch of the municipality so as to relieve it, at least in the absence of statutory provisions to the contrary, from liability for injuries to person or property resulting from malfeasance or nonfeasance in connection with its maintenance and operation, the plaintiff has avoided any allegation of negligence relating to the fire department of the city, or that the loss was occasioned by the conduct of any of the agents or employees of this department. On the other hand, it is specifically averred that the fire department of the city could and would have extinguished the fire but for the negligence of the defendant's agents and employees engaged in repairing and paving its streets. The plaintiff, therefore, seeks to hold the defendant liable upon the theory that the negligence of its street department, in placing rocks or curbstones around a fire-plug or hydrant, in violation of a city ordinance, was the direct and proximate cause of plaintiff's loss, in that such negligent conduct, on the part of those engaged in repairing or paving its streets, made it impossible for the fire department of the city to save the plaintiff's property from destruction by fire, which, it is alleged, the fire department could and would have done but for the negligence of the defendant's street department.

It was said in *Jones v. Henderson,* 147 N. C., p. 125, that the duty of a municipal corporation to repair its streets and to keep them in good condition is a ministerial one, and when the servants of a municipality undertake to perform this duty they must exercise reasonable care in so doing, or the corporation may be held liable for any injury proximately resulting from their negligence. *Hoyle v. Hickory,* 164 N. C., 79; *S. c.,* 167 N. C., 619. The cases of *Bunch v. Edenton,* 90 N. C., 431, *Downs v. High Point,* 115 N. C., 182, *Threadgill v. Comrs.,* 99 N. C., 352, and *Williams v. Greenville,* 130 N. C., 93, furnish examples of the liability of such corporations for the failure to exercise or for the improper exercise of ministerial or corporate duties. See, also, *Dorsey v. Henderson,* 148 N. C., 423; *Hull v. Roxboro,* 142 N. C., 453.

But the proximate cause of plaintiff's loss was the failure of the fire department of the defendant city to put out the fire; and it is conceded that if the fire department had not responded at all, or if it had negligently permitted the water mains and hydrants to become and remain chocked and clogged with mud, stones, etc. (*Miller v. Minneapolis,* 75 Minn., 131; *Mendel v. Wheeling,* 28 W. Va., 233), or was otherwise

negligent, which resulted in loss to the plaintiff, no recovery could be had. The language of C. S., 2807, above set out, is that the city "shall in no case be liable for damages for a failure to furnish a sufficient supply of either water or light."

The fire which destroyed plaintiff's property originated in some unaccountable way. There is no contention that the city was responsible for its origin, or that it committed any breach of duty in this respect. It is alleged in the instant case that the agents and employees of the street department of the defendant city negligently placed the curbstones around the hydrant in question; but does it not follow, as a necessary corollary, that the agents and employees of the fire department permitted them to remain there for six or eight months? Even if the logic of the defendant's position in this respect be not convincing, how is the plaintiff to escape the force of the statute which provides that the *city* shall *in no case* be liable in damages for a failure to furnish a sufficient supply of water? Let it be conceded, but only for the sake of argument, that the negligence of the street department was a proximate cause, or one of the proximate causes, of plaintiff's loss, still this was the city's negligence, and the city, under the statute, is not to be held liable in any case for a failure to furnish a sufficient supply of water. It is the duty of a municipal corporation, in the exercise of proper care, to keep and maintain its streets in a reasonably safe condition for public travel, but we have no decision in this jurisdiction holding a city liable to suit with respect to the care of its streets, which would include a case of this kind.

If another *tort-feasor* or other *tort-feasors,* not protected by the statute or otherwise, had negligently interfered with the fire department while attempting to extinguish the fire, a different situation would have been presented, so far as might have concerned the question of liability of such other *tort-feasor* or *tort-feasors.* See note, 5 A. L. R., 1651. But this is not our case.

While it is sufficient to rest our present decision on the statute shielding the municipality from liability in such cases, it is not to be understood that a contrary holding would have followed but for the existence of this statute. The pertinent authorities are otherwise. *Small v. Frankfort,* 203 Ky., 188, 33 A. L. R., 692; *Hazel v. Owensboro,* 30 Ky., 627, 9 L. R. A. (N. S.), 235. However, we need not discuss a supposed or hypothetical case, or one not before us.

The motion for judgment as of nonsuit was properly allowed.

Affirmed.

H. J. MARSHALL, ADMINISTRATOR OF FRANK RYAN, DECEASED, v. E. T. KEMP AND U. S. FIDELITY & GUARANTY COMPANY OF BALTIMORE.

(Filed 18 November, 1925.)

1. Executors and Administrators—Trusts—Good Faith—Ordinary Care—Insurer—Officers.

An executor or administrator is not held to be an insurer in executing the trust arising from such position, but only to act in good faith, with due diligence and ordinary care, in accordance with the responsibility of his office.

2. Same—Evidence—Directing Verdict—Appeal and Error—New Trials.

Where an administration of the estate of the decedent is contested upon the ground that invalid letters had been issued to him by the clerk of the Superior Court of the wrong county, and it has been determined against him acting in good faith on appeal to the judge of the Superior Court, and by the Supreme Court on further appeal, an instruction that fixes the liability of the administrator and his bondsmen if this evidence is accepted by the jury, for a deposit he had made in a bank that had since become insolvent, is reversible error, it being for them to determine further as to whether he had acted in good faith and the care required in such instances.

STACY, C. J., not sitting.

APPEAL by defendant from *Dunn, J.*, at May Term, 1925, of NEW HANOVER.

Frank Ryan died in Pender County 1 August, 1922. On 14 August, 1922, letters of administration upon his estate were issued by the clerk of the Superior Court of New Hanover to the defendant Kemp, who was a resident of Brunswick County; and afterwards (on 25 September) similar letters were issued to the plaintiff by the clerk of the Superior Court of Pender. Thereafter (29 September), the plaintiff filed a petition before the clerk in New Hanover to recall the letters issued to Kemp and to remove him from the office of administrator on the ground that the deceased at the time of his death was domiciled in Pender County. C. S., 1. The petition was allowed and the appointment of Kemp was revoked on 9 October. Upon Kemp's appeal to the Superior Court the clerk's order was affirmed and upon his appeal to the Supreme Court the judgment of the Superior Court was affirmed. *In re Ryan,* 187 N. C., 569. At the time of his death the intestate had on deposit in the Liberty Savings Bank, of Wilmington, the sum of $2,489.30; and after his qualification as administrator the plaintiff drew a check for said amount and the bank refused to make payment for the alleged reasons that it did not recognize the plaintiff as the personal representative of the deceased and that the defendant's attorney objected to the

payment. The plaintiff alleged that the administration in New Hanover had been procured by an agreement between Thomas E. Cooper and the defendant Kemp for the purpose of keeping the deposit in said bank and preventing its withdrawal therefrom.

The defendant Kemp filed an answer admitting the appointment of the two administrators, denying certain allegations of the complaint, and alleging by way of further defense that he had executed a bond with his codefendant as surety, and that all acts performed by him as administrator had been directed and supervised by the clerk for the purpose of preserving and protecting the estate; and further that his check for the amount of the deposit had been dishonored because the plaintiff had objected to its being paid. The Fidelity and Guaranty Company filed an answer of similar import, setting out the bond it had executed as surety for Kemp. The money remained in the Liberty Savings Bank until the day of its failure. On 2 September, 1924, the plaintiff brought this suit to recover of the defendants the amount of his intestate's deposit namely, $2,489.30. On the trial two issues were submitted to the jury:

1. Did the defendant wrongfully refuse to pay over to the plaintiff as administrator of Frank Ryan, the money on deposit in the Liberty Savings Bank to the credit of said Frank Ryan? Answer: Yes.

2. What damages, if any, has plaintiff sustained on account of said wrongful refusal to pay over said moneys? Answer: $2,489.30, with interest from 25 September, 1922.

The following instruction was given:

"The court being of the opinion, as a matter of law, that the refusal of the defendant to pay over said moneys was wrongful, and that thereafter he held said moneys at his peril, it being admitted that the letters of administration issuing to the said defendant were declared void and canceled by the clerk of this court on 9 October, 1922, the court instructs the jury upon the first issue, if it finds the facts as testified to by all the witnesses, to answer the first issue yes and the second issue $2,489.30, with interest from 25 September, 1922."

Judgment was rendered in favor of the plaintiff and the defendants appealed.

John D. Bellamy & Sons for plaintiff.
Rountree & Carr for defendants.

ADAMS, J. The clerk of the Superior Court of New Hanover revoked Kemp's letters of administration on 9 October, 1922. The jury were instructed that Kemp thereafter held the money on deposit at his peril and if they found the facts to be as the witnesses had testified, the answer to the first issue should be "Yes," and to the second the full amount of

the plaintiff's claim with interest thereon from 25 September, 1922. The instruction implied either that Kemp's liability was definitely fixed when the letters were recalled or that by virtue of his qualification as administrator he was an insurer of the assets coming into his hands. In our opinion neither of these positions can be maintained.

The liability of a public officer differs from that of a trustee or a bailee. The general rule is that an officer who enters into an obligation to account for money received by virtue of his office insures the safety of all funds received by him in his official capacity,—insures, as *Justice Rodman* said, against loss by any means whatever, including such losses as arise from the act of God or the public enemy. *Comrs. v. Clarke,* 73 N. C., 255. In *Havens v. Lathene,* 75 N. C., 505, *Chief Justice Pearson* expressed the same opinion by saying that such officer is accountable as a debtor who can relieve himself only by payment. His liability is founded on public policy and the evil consequences which would follow from a less rigid rule as well as on the language of his official bond. *Wilmington v. Nutt,* 78 N. C., 177; *Morgan v. Smith,* 95 N. C., 396; *Board of Education v. Bateman,* 102 N. C., 52; *Presson v. Boone,* 108 N. C., 78; *Smith v. Patton,* 131 N. C., 396. See, also, *U. S. v. Prescott,* 3 How., 578, 11 Law Ed., 734; *U. S. v. Morgan,* 11 How., 154, 13 Law Ed., 643; *U. S. v. Dashiell,* 4 Wall., 182, 18 Law Ed., 319; *Smythe v. U. S.,* 188 U. S., 156, 47 Law Ed., 425.

The rule laid down for the administration of estates is not so exacting. An executor or administrator is held to the liability of other trustees; he is therefore not an insurer. He must faithfully execute his trust and act in relation to it with due diligence. For negligence or a want of ordinary care which evidences bad faith of course he is answerable. "Administrators, like other trustees," said the Court in *Woody v. Smith,* 65 N. C., 116, "are not to be held liable as insurers or for anything but *mala fides* or want of reasonable diligence." All that sound public policy requires is good faith and ordinary care (*Nelson v. Hall,* 58 N. C., 32); for, as suggested by *Chief Justice Nash* (*Deberry v. Ivey,* 55 N. C., 370), if they cannot be protected by an honest endeavor to perform their duties responsible men will rarely incur the hazard of an administration on a decedent's estate. *Beall v. Darden,* 39 N. C., 76; *Williamson v. Williams,* 59 N. C., 62, 66; *Atkinson v. Whitehead,* 66 N. C., 296; *Dortch v. Dortch,* 71 N. C., 224; *Mendenhall v. Benbow,* 84 N. C., 646, 648; *Torrence v. Davidson,* 92 N. C., 437; *Syme v. Badger,* 92 N. C., 706, 715; *Halliburton v. Carson,* 100 N. C., 99, 108; *Moore v. Eure,* 101 N. C., 11, 16; *Tayloe v. Tayloe,* 108 N. C., 70; *Smith v. Patton, supra; Twiddy v. Mullen,* 176 N. C., 16; *Cobb v. Fountain,* 187 N. C., 335.

The duty of an administrator in dealing with assets in his possession is to be measured by the standard set up in these cases. Kemp's liability,

therefore, is not to be determined as a matter of law solely by the clerk's order setting aside the letters that had been issued to him in New Hanover County. The plaintiff contends that these letters were void because the clerk in New Hanover was without jurisdiction; but this was the question that Kemp undertook to contest. It is true, he admitted that Ryan at the time of his death was a resident of Pender; but in doing so he did not necessarily admit that Ryan had his domicile there. C. S., 1; *Roanoke Rapids v. Patterson,* 184 N. C., 135; *In re Martin,* 185 N. C., 473; *Thayer v. Thayer,* 187 N. C., 573; *Tyer v. Lumber Co.,* 188 N. C., 268. And while he was not required in law to appeal from the clerk's order (*Pate v. Oliver,* 104 N. C., 458), he had the legal right to appeal therefrom to the Superior Court and from an adverse ruling thence to the Supreme Court. Constitution, Art. IV, secs. 12, 22; C. S., 633, 637, 638; *Rush v. Steamboat Co.,* 67 N. C., 47; *Rhyne v. Lipscomb,* 122 N. C., 650.

Findings of fact are essentially involved in the question whether in contesting the right to administration and the plaintiff's claim to the deposit Kemp was moved only by an honest purpose to protect the assets in his hands and to discharge the duties imposed upon him by the law, or whether he was in collusion with Cooper or was impelled by an evil motive or acted in bad faith or by perversely contending with the plaintiff caused the loss of the money, having reasonable cause to believe that he was not entitled to the letters of administration. Any competent evidence relating to these contentions should have been submitted to the jury either under the first issue in the record or under the issue tendered by the defendant; and for error in the instruction given the defendants are entitled to a new trial.

New trial.

STACY, C. J., not sitting.

FAIRLEY BROTHERS v. J. A. ABERNATHY, RECEIVER.

(Filed 18 November, 1925.)

Removal of Causes—Transfer of Causes—Injunction—Equity—Personal Property—Statutes.

Where injunctive relief is sought in a suit against the receiver of a corporation from the sale of cotton and manufactured products therefrom, and the delivery of the cotton and goods to the plaintiff, the nature of the action will be determined from the relation of the parties, their agreement upon the subject-matter of the suit, and the allegations of the complaint, and it appearing therefrom that the relief sought is not the recovery of the

debt or to enjoin a sale, but the recovery of the specific personal property with the injunctive restraint as an incident thereto, the cause is properly removable to the Superior Court of the county, under our statute, where the personal property is situated. C. S., 463.

APPEAL by plaintiff from an order of *McElroy, J.*, made at August Term, 1925, of the Superior Court of UNION, removing the cause to GASTON.

On 15 April, 1925, the defendant was appointed receiver of the McLean Manufacturing Company, a corporation theretofore doing business in Gaston County. In May, 1925, the plaintiffs brought suit against the defendant and filed their "petition and complaint," in which they alleged that they were the owners of certain stock in process of manufacture by the McLean Manufacturing Company, consisting of sixty bales of cotton partially manufactured into cloth; that said property was in the possession of the defendant who was wrongfully undertaking to sell it; that a sale of it would cause irreparable injury and damage to the plaintiffs and that it was necessary for the protection of their rights that the defendant should be enjoined from making the sale.

The basis of the plaintiff's claim is a written agreement made on 2 April, 1925, between themselves and the McLean Manufacturing Company, and A. A. McLean, Jr., the material parts of which follow:

"Whereas, on or about 12, 16, and 17 March, 1925, the party of the first part purchased of the parties of the second part a total of 60 bales of cotton for the total sum of $7,551.35, to be paid for by said McLean Manufacturing Company out of the proceeds of sales of goods manufactured therefrom, and title to said cotton or goods therefrom manufactured to be or remain in said Fairley Brothers until the purchase price of said cotton was paid, and,

"Whereas, the said sum has not been paid and McLean Manufacturing Company, is indebted to Fairley Brothers in the sum of $7,551.35, with interest on same from 12 March, 1925, and said cotton is now in process of manufacture in the plant of McLean Manufacturing Company, the said cotton being now identified and identifiable as all cotton in process of manufacture in machinery in said plant or in finished goods now in the plant manufactured therefrom, and it is agreed that same is the property of Fairley Brothers:

"Now in order to protect the rights of Fairley Brothers, the parties hereto do agree as follows:

"1. Fairley Brothers will not take steps to put McLean Manufacturing Company in the hands of receivers if and so long as McLean Manufacturing Company performs its part of this agreement.

"2. McLean Manufacturing Company holds all goods in process of manufacture hereinbefore referred to, and A. A. McLean, Jr., indi-

vidually holds same with McLean Manufacturing Company in trust for Fairley Brothers as their agent or consignee or trustee or bailee for the purpose of completing manufacture of same and safely keeping same and delivering finished product of same to Fairley Brothers or their order. It is agreed that McLean Manufacturing Company and A. A. McLean, Jr., will immediately furnish Fairley Brothers, or their representatives, with itemized statement of poundage, yardage, stage of manufacture and present location in the plant of the McLean Manufacturing Company of the 60 bales of cotton held by them for Fairley Brothers.

"3. If and when from proceeds of manufacture, or sale of manufactured products, McLean Manufacturing Company or A. A. McLean, Jr., both shall pay Fairley Brothers, or Fairley Brothers shall receive from same the value of their cotton, namely $7,551.35, with interest as aforesaid, and expenses connected with supervision of manufacture and disposition of same, as well as any other items of expense necessarily connected with this manufacture, this agreement is to be null and void, otherwise to remain in full force and effect.

"4. McLean Manufacturing Company and A. A. McLean, Jr., covenant, agree and represent as an inducement to obtain the extension of indulgence from Fairley Brothers that:

"1. The cotton in process of manufacture is free of all claims or liens except the title to Fairley Brothers.

"2. That McLean Manufacturing Company and A. A. McLean, Jr., will not suffer any claims or liens to and against same and will faithfully hold same in trust for Fairley Brothers."

The plaintiffs further alleged that in pursuance of this agreement the Manufacturing Company and A. A. McLean, Jr., undertook to manufacture the cotton under the terms of the contract and had it distributed throughout the plant in course of manufacture and that it was impossible to remove it from the machinery until the process of manufacturing it was completed; that the receiver is experienced in the operation of cotton mills, controlling the machinery necessary to complete the manufacture of the cotton as the contract provides.

The relief prayed for is a restraining order (which was granted) and a decree requiring the receiver to complete the manufacture of the cotton into cloth and to deliver the manufactured product to the plaintiffs.

Before the time for filing an answer had expired the defendant made a formal motion before the clerk (Laws 1921, Ex. Ses., ch. 92, sec. 1, 15) to remove this cause to Gaston County in which the Manufacturing Company has its place of business, and on appeal to the Superior Court the motion was allowed and the plaintiff excepted and appealed.

Vann & Millikin for plaintiffs.
C. A. Jones and A. L. Quickel for defendant.

ADAMS, J. Actions for the recovery of personal property must be tried in the county in which the subject of the action, or some part thereof is situated, subject to the power of the court to change the place of trial in the cases provided by law. C. S., 463. Was the present action brought for the recovery of personal property within the meaning of this section? The defendant contends that it was; but the plaintiffs say that it was brought to enforce the specific performance of a contract relating to personal property. The nature of the action must be determined by the relation of the parties, their agreement, and the allegations in the complaint. The contract which is dated 2 April, 1925, recites a previous sale by the plaintiffs (12, 16, 17 March, 1925) of sixty bales of cotton to the McLean Manufacturing Company, at the price of $7,551.35, to be paid out of proceeds to be derived from the sale of goods manufactured from the cotton,—the title of the cotton or of the manufactured articles to remain in the plaintiffs until the contract price was paid. In consequence of the manufacturing company's failure to pay the price the parties agreed that the company and A. A. McLean, Jr., should hold the goods in process of manufacture in trust for the plaintiffs as their agent or consignee or trustee or bailee, for the purpose of completing the manufacture of the cotton into cloth and delivering the finished product to the plaintiffs or their order. The relief prayed is that the receiver comply with the contract and deliver to the plaintiffs not the cotton "raw" or "partially manufactured," but the cloth as the manufactured product. The manufacture of the cotton must of course precede the delivery of the cloth; but to convert the raw material into cloth is only an incident in carrying out the main purpose of the contract and granting the chief relief demanded in the complaint, namely, the recovery of the cloth. If the cloth shall not be delivered the plaintiffs will not have the relief they ask. It is immaterial whether the relation between the parties is that of principal and agent or consignor and consignee or trustor and trustee or bailor and bailee. Their manifest purpose was to secure the plaintiffs by making them the beneficial owners of "all goods" whether manufactured or in the process of manufacture; and the plaintiffs, relying upon this claim, seek to recover the actual possession of the article in its manufactured state. The manufacturing company and A. A. McLean, Jr., are alleged to be insolvent; and the relief sought is not the recovery of the debt and a sale of the property as incidental thereto, as in *Piano Co. v. Newell,* 177 N. C., 533, and similar cases, but the recovery of specific personal property, with injunctive restraint as an incident of the recovery. It seems to be unquestionable

that this is the chief if not the sole purpose of the action. The entire subject-matter is in Gaston County, and the venue, as *Judge McElroy* held, is fixed by C. S., 463 (4). There are several cases in which the apposite principle is discussed and the decisions are distinguished. *Woodard v. Sauls,* 134 N. C., 274; *Brown v. Cogdell,* 136 N. C., 32; *Edgerton v. Games,* 142 N. C., 223; *Clow v. McNeill,* 167 N. C., 212; *Mfg. Co. v. Brower,* 105 N. C., 440.

The judgment is

Affirmed.

STATE v. DORSEY ALLEN.

(Filed 18 November, 1925.)

Intoxicating Liquors—Spirituous Liquors—Instructions—Appeal and Error—Evidence—Questions for Jury—Statutes.

Upon the trial under an indictment for violating the prohibition law, there was evidence that an illicit still was found without connecting its operation with the defendant, but that a coat was found there with a receipt with defendant's name on it in one of the pockets: *Held,* an instruction that the name on the receipt was sufficient evidence that it was the property of defendant, and it should be considered to identify the coat, is an expression of an opinion upon the weight and credibility of the evidence inhibited by statute, and reversible error. C. S., 564.

APPEAL by defendant from *McElroy, J.,* at August Term, 1925, of MOORE.

Criminal prosecution tried upon an indictment charging the defendant (1) with the unlawful manufacture of spirituous liquors or intoxicating bitters (C. S., 3367), and (2) with having or keeping in his possession, for the purpose of sale, certain spirituous, vinous or malt liquors (C. S., 3379), contrary to the statutes in such cases made and provided, etc.

From an adverse verdict and sentence of six months on the roads, the defendant appeals, assigning errors.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

W. R. Clegg for defendant.

STACY, C. J. A still was discovered in the upper end of Moore County on 26 November, 1924. The officers found a coat at the still site, and in one of the pockets was a receipt, made out in the name of the defendant, Dorsey Allen, for three years subscription to the *Southern Planter,* a newspaper published at Richmond, Va. The defendant was not seen at the still, though some one, other than the defendant, ran away as the officers approached.

The court instructed the jury as follows:

"The court charges you, gentlemen, that the name on the receipt is sufficient proof that the receipt was the property of the defendant, Dorsey Allen, and that its purpose is to identify the coat and it is admitted for this purpose, and if you find that the receipt is sufficient evidence to identify the owner of the coat, then you will return a verdict of guilty."

The Assistant Attorney-General, with his usual candor, frankly confesses his inability to defend this instruction. It contains an expression of opinion, in violation of C. S., 564, as to the sufficiency and weight of the evidence. *S. v. Hart,* 186 N. C., 582; *Speed v. Perry,* 167 N. C., 122. The error, of course, was unintentional. It is just one of those casualties which, now and then, befalls the most circumspect in the trial of causes on the circuit. *S. v. Kline, ante,* 177.

New trial.

AMBROSE BARE v. A. A. THACKER.

(Filed 18 November, 1925.)

Actions—Torts—Debt—Fraud—Independent Actions.

Where an action for debt has been prosecuted to final judgment, establishing the debt, an independent action in tort may thereafter be maintained for fixing the defendant with fraud in its procurement subsequently discovered by the plaintiff. *Machine Co. v. Owings,* 140 N. C., 503, cited and approved.

APPEAL by plaintiff from *Schenck, J.,* at April Term, 1925, of ASHE.

Civil action in tort to fix the defendant with liability for fraud in contracting a debt.

Plaintiff alleges that in November, 1922, he was induced to sell some cattle to the defendant and to extend him credit therefor to the extent of $770.00.

Upon failure to pay for said cattle, plaintiff brought suit against the defendant in the Superior Court of Ashe County and obtained judgment for his debt on 30 April, 1923. Execution was issued on this judgment and returned *"nulla bona."*

Plaintiff alleges that he was induced to sell the cattle in question to the defendant and to extend him credit therefor upon the representation, fraudulently made by the defendant, that he was amply solvent and able to meet his obligations. This representation, it is alleged, was false and was made with intent to deceive the plaintiff, and plaintiff acted upon it to his injury. Plaintiff further alleges that he did not discover

the fraud until after his suit, brought to establish the debt, had been tried and execution returned unsatisfied.

At the close of plaintiff's evidence, and on motion of defendant, there was a judgment as of nonsuit, from which the plaintiff appeals.

T. C. Bowie for plaintiff.
Brawley & Gantt and Councill & Bauguess for defendant.

STACY, C. J. The judgment of nonsuit was entered upon the theory that the matter, now sought to be litigated, was waived by the plaintiff in his suit on the debt, and that an independent action in tort may not be brought to establish the fraud, after judgment has been taken on the debt, in the contracting of which, it is alleged, the fraud was practiced. C. S., 768, subsection 4.

It is conceded that the issue of fraud was not raised in the first suit. Defendant says in his answer: "There was no allegation of fraud in the former complaint, no issue submitted to the jury and no order of arrest served in said action." Indeed, plaintiff alleges that he did not discover the fraud until after execution on the judgment, establishing the debt, had been returned unsatisfied. So we have the naked question as to whether an issue of fraud may be raised and tried after judgment on the debt, in the contracting of which, it is alleged, the fraud was practiced. We perceive no valid reason why this should not be done, especially when the plaintiff was ignorant of the fraud at the time of suit on the debt. *Stewart v. Bryan,* 121 N. C., 46; *Preiss v. Cohen,* 117 N. C., 54; *Peebles v. Foote,* 83 N. C., 102; *Claflin v. Underwood,* 75 N. C., 485.

The authorities elsewhere are in sharp conflict as to whether a vendor of chattels, who has been induced to sell by the fraudulent representations of the vendee, may maintain an action in tort for such fraud after having sued for the purchase price. See note, 8 L. R. A. (N. S.), 582. But in North Carolina the question has been resolved in favor of the maintenance of such a suit. Speaking directly to the point in *Machine Co. v. Owings,* 140 N. C., 503, where the question was decided, *Hoke, J.,* said: "No reason occurs to us why a suit by plaintiff on the contract, pursued to judgment, uncollected and apparently uncollectible, should bar an action to recover damages for fraud and deceit on the part of defendant, and by means of which the sale was procured. Both actions are consistent in theory, and both in affirmance of the sale. The remedies, in this jurisdiction at least, while consistent, are not always entirely coextensive, nor are the damages necessarily the same. The weight of authority is also against the position of defendant."

On authority of this case, the judgment of nonsuit must be

Reversed.

ELLIOTT BUILDING COMPANY, INCORPORATED, v. CITY OF GREENSBORO.

(Filed 18 November, 1925.)

1. Contracts—Municipal Corporations—Cities and Towns—Bids—Acceptance.

A municipal corporation advertised for sealed bids to construct its water and sewer system to be accompanied by a certified check in a stated sum as a guarantee of good faith, with provision that parts of work should not be let out to subcontractors without the consent of the city, and at the date specified opened the bids and awarded the contract to the plaintiff in exact accordance with its proposal, subject to investigation as to its ability to perform the same: *Held*, the acceptance of the bid by the city made a binding contract, subject to the investigation by the city.

2. Same—Reasonable Time.

Where a municipal corporation accepts a bid for its water and sewer system subject only to its right to investigate the responsibility of the bidder to perform it, it is incumbent upon the city to make the investigation within a reasonable time, and the bidder may not withdraw its bid after its final and complete acceptance by the municipality.

3. Same—Interpretation.

Where a municipality has accepted a bid for the construction of its waterworks and sewer system subject to an investigation as to the ability of the bidder to perform it, without authority to subcontract it either in whole or in part without the consent of the city, and pending this inquiry the bidder notifies the city of its intention to subcontract certain parts: *Held*, construing the offer, under its terms, and the notification together, the latter was not in effect a withdrawal of the bid, but at most only notice that, if the bid was accepted, the bidder's right to request permission to sublet would be exercised.

4. Same—Actions—Damages.

Where a bidder for the erection of a water and sewerage system of a city, has put up a certified check in a certain amount as a guarantee of its ability to perform the contract in good faith if awarded to it, which was to be given to the lowest responsible bidder, under sealed bids to be opened at a stated time and when awarded to it fails or refuses to perform the contract, it may not maintain its action at law to recover the amount of the check it had deposited, when it was necessary for the city to retain it in order to protect itself from loss by the contract being given to a higher bidder.

APPEAL by plaintiff from GUILFORD Superior Court. *Schenck, J.*

Action by plaintiff, to recover $5,000 deposited with defendant, with its bid on water and sewer construction. From a judgment of nonsuit plaintiff appeals. Affirmed.

Plaintiff contends that the defendant, having the "managerial" system of government, prior to 12 February, 1924, advertised for bids for the construction of a large water and sewer system, stating that "proposals

will be received by the city council of Greensboro, North Carolina, until 2:15 o'clock p. m., Tuesday, 12 February, 1924." The advertisement stated that specifications could be secured from M. M. Boyles, its engineer, where plans and profiles were on file, and requiring that "each bid must be accompanied by a certified check in the sum of $5,000, made payable to the city of Greensboro, N. C.," and that "bids will be opened publicly and read at the city hall on Tuesday, 12 February, 1924, at 2:15 o'clock p. m."

The defendant furnished to prospective bidders its specifications, forms of proposal or bids and form of contract. Pursuant to this advertisement plaintiff, on 12 February, 1924, made and filed its bid in writing, using defendant's prescribed form, with its check for $5,000. Plaintiff's representative was present at the opening of the bids. The contract was not awarded then, but was postponed, and no objection was made to this postponement. Plaintiff, 16 February, 1924, by letter to defendant's manager, advised that if awarded the contract it would sublet the machine work and that, "we do not propose to buy any machines for this work." On 20 February, 1924, plaintiff sent to defendant's mayor a telegram, stating: "We hereby withdraw our proposal on construction water and sewer."

Defendant alleges that plaintiff filed its bid, accompanied by check and was awarded contract before notice of withdrawal, but failed to execute the contract in accordance with its bid. It further says that the award was not made on 12 February, 1924, but the matter was taken under advisement, with the consent of the plaintiff, for the purpose of inquiry by defendant's manager and waterworks superintendent, so as to satisfy them that the plaintiff could get its equipment and organization ready for duty in a reasonable length of time, and that the letters and telegrams of the plaintiff were received, but plaintiff's telegram was received after plaintiff's bid had been accepted, and defendant claims the $5,000 has been forfeited to its use and is now its property.

Defendant alleges that, on account of the failure of the plaintiff to execute its contract, it was required to accept the next lowest bid which was more than the plaintiff's.

Plaintiff's evidence included the contract and specifications bid on, and tended to show that defendant's minute book contains, as of 13 February, 1924, the following entry: "Councilman Price moved that the contract for the construction of water and sewer lines be awarded to the lowest bidder, which was the Elliott Building Company of Hickory, North Carolina, provided that city manager Painter and superintendent of the water department, Mr. Boyles, were satisfied that they, the Elliott Building Company, could get their equipment and

organization ready for duty in a reasonable length of time, and that the mayor and city manager Painter be authorized to execute a written contract on behalf of the city.

Plaintiff's letter to defendant's manager, on 16 February, 1924, contained the following: "We will appreciate the kindness very much if you will either accept our proposition as made to you on the 12th, or reject the proposition and return our check at once." This letter also contained the statement that the plaintiff was going to sublet the "machine work." Defendant's manager sent on 20 February, to plaintiff a letter stating that it had been awarded the contract for sewer and water in accordance with the provisions of the contract, specifications and proposal, and not in accordance with plaintiff's letter of the 16th. It was admitted by defendant that no action was taken by defendant's council in accepting or attempting to accept the bid on 12 February, 1924.

Plaintiff introduced defendant's allegation that its telegram, attempting to withdraw its bid, was received 20 February, 1924, and that defendant has collected and appropriated the $5,000 check.

The proposal submitted by plaintiff declares that it had carefully examined the contract and "hereby agrees to enter into a contract to construct and complete the said work in accordance with the plans and specifications therefor, and the requirements of the engineer under them, and within ten days from the date of the acceptance of this proposal, will furnish such good and acceptable bond as required in paragraph five of 'Instructions to Bidders.'" Its proposal further provided that, "in the default of the performance of any of these conditions on our part to be performed, the sum of $5,000 attached to this proposal shall, at the option of the mayor and city council, become the property of the city of Greensboro, N. C., and sustained and liquidated damages for such default; otherwise the sum of $5,000 shall be returned" to the plaintiff. The contract contemplated by this proposal and made a part thereof provided as follows: "No assignment or subletting of the work, or any part thereof, will be recognized or binding without the written consent of the city endorsed on the contract."

King, Sapp & King for plaintiff.
B. L. Fentress, A. Wayland Cooke and Alfred S. Wyllie for defendant.

VARSER, J. Plaintiff's representative was at the opening of the bids on 12 February, 1924. No objection was made to the continuance for further consideration. Plaintiff's letter to defendant's manager on 16 February, asked for an early acceptance or rejection of its bid filed with defendant on 12 February. The action of the defendant through its

council, on 13 February, 1924, as set forth in its resolution, is not material to this matter, for that it appears that the acceptance relied upon by defendant took place 19 February. This fact eliminates from our consideration the contention that the resolution of 13 February is conditional and not an acceptance, but a rejection. It is certainly not a rejection and no notice thereof having been given to plaintiff, and with plaintiff's letter of 16 February plainly treating its bid as still open for defendant's consideration and acceptance and requesting that defendant take early action thereon, does not amount to a withdrawal.

The rights of the parties depend upon whether there was a contract. It is admitted that the plaintiff did not, upon notice of defendant's acceptance of its bid, execute the contract specified in its written proposal and did not attempt to perform the work contemplated by its bid. It is further admitted that the defendant retained the $5,000 deposited with plaintiff's bid on account of plaintiff's failure to execute the contract and perform the work.

A contract is "an agreement upon sufficient consideration to do or not to do a particular thing." Blackstone, Book 2, 442; Mordecai's Law Lectures, 1104. Three things are contemplated in all contracts: First, *the agreement;* second, *the consideration;* third, the thing to be done or omitted, or, the different species of contracts. Blackstone, *supra;* Mordecai's Law Lectures, *supra.* Only the first element of contracts concerns us in this case. The other two are admittedly present if the first exists. We are of opinion that the first element, to wit, the agreement, does exist in the instant case.

When the plaintiff filed its written bid or proposal, containing definite terms, with defendant, and the defendant accepted this written proposal, the contract was complete. The two primary elements constituting the agreement, to wit, the offer and the acceptance, were existent. *Bailey v. Rutjes,* 86 N. C., 517, 520; *May v. Menzies,* 184 N. C., 150; *Brunhild v. Freeman,* 77 N. C., 128; *Pendleton v. Jones,* 82 N. C., 249; *Elks v. Insurance Co.,* 159 N. C., 619; *Crook v. Cowan,* 64 N. C., 743. This offer and acceptance created an agreement and did not leave the matter subject to what either party may have thought. *Brunhild v. Freeman, supra.* The acceptance of plaintiff's offer (*Crook v. Cowan, supra*), within a reasonable time (*Mizell v. Burnett,* 49 N. C., 249; *Rucker v. Sanders,* 182 N. C., 607), completed the agreement. The acceptance in the instant case was identical with the offer made in every respect and constituted mutual assent to the identical proposal made by plaintiff without "doubt or difference." *Grandy v. Small,* 50 N. C., 50; *Walker v. Allen,* 50 N. C., 59; *Morrison v. Parks,* 164 N. C., 197; *Sumrell v. Salt Co.,* 148 N. C., 552; *Rucker v. Sanders, supra; Baker v. Lumber Co.,* 183 N. C., 577; *Freeman v. Croom,* 172 N. C., 524; *Gregory v. Bullock,*

120 N. C., 260, 261; *Elks v. Insurance Co., supra; Wooten v. Drug Co.*, 169 N. C., 64; *Croom v. Lumber Co.*, 182 N. C., 217, 220; *Howell v. Pate*, 181 N. C., 119; Page on Contracts, vol. I, sec. 46; *National Bank v. Hall*, 101 U. S., 43; *Egger v. Nesbitt*, 43 Am. St. Rep., 596; *Minneapolis & St. Louis Ry., v. Columbus Rolling Mill*, 119 U. S., 149; *Cozart v. Herndon*, 114 N. C., 252; 6 R. C. L., 608; *Golding v. Foster*, 188 N. C., 216.

A delay in accepting an offer permits a withdrawal (*Watters v. Hedgpeth*, 172 N. C., 310), which is the right of the offerer. *Cooper v. Lansing Wheel Co.*, 34 Am. St. Rep., 341; Page on Contracts, sec. 33; 6 R. C. L., 603; *Eskridge v. Glover*, 26 Am. Decisions, 344, 349; *Strook Plush Co. v. New England Cotton Yarn Co.*, 100 N. E., 617; *Rucker v. Sanders, supra;* Elliott on Contracts, sec. 175. The acceptance must precede notice of withdrawal of bid. *Cozart v. Herndon, supra; Edmondson v. Fort*, 75 N. C., 404. The telegram from plaintiff to defendant was dated 20 February, 1924, the acceptance by defendant of plaintiff's offer was on 19 February, 1924, and the evidence offered by plaintiff shows clearly that defendant did not receive the telegram of withdrawal prior to its acceptance.

Plaintiff claims that its letter of 16 February, when it advised defendant that it would sublet the machine work, was such a modification as to constitute a new bid and withdraw the old. The letter as a whole, treats the original bid as still in force and the statement as to subletting is made upon the assumption that the original bid will be accepted and the contract named therein will be executed. This contract provided that subletting could only be done with the written assent of the defendant, and construing the letter with the written proposal, the letter is not a modification. At most it is only notice that, if the bid is accepted, its right to request permission to sublet, will be exercised. The defendant had the right to modify before acceptance, but we are of the opinion that it did not modify. The defendant, therefore, is within its rights in holding the money deposited by plaintiff with its bid as security for its performance of the contract when accepted. McQuillan on Municipal Corporations, vol. 3, sec. 1221; *Turner v. Fremont*, 170 Fed., 259, 263; 95 C. C. A., 455; *City of Portsmouth v. Portsmouth & Norfolk Corporation*, 95 S. E., 279; *Wheaton Lumber Co. v. Boston*, 90 N. E., 598.

This is an action at law to recover the money deposited, and after acceptance this cannot be done. McQuillan on Mun. Corps., *supra; Moffitt v. Rochester*, 198 U. S., 873; *Kimball v. Hewitt*, 2 N. Y. S., 697; *Baltimore v. Robinson Construction Co.*, L. R. A., 1915-A, 225.

The defendant had a reasonable time in the absence of notice of withdrawal or modification to consider plaintiff's bid and determine whether it would accept it or not. The money deposited was to guarantee that

plaintiff would execute the contract, with the bond contemplated, if its offer was accepted. *Baltimore v. Robinson Construction Co., supra; Wheaton Bldg. & Lumber Co. v. Boston,* 90 N. E., 598.

We see no reason to disturb the judgment of the court below. Opportunity to change the offer is afforded the offerer until acceptance, but when accepted and the constituent elements of an enforceable contract exist, it is to the interest of the parties, and society, as well, that contracts be performed as made.

Let it be certified that the judgment of the court below is

Affirmed.

STATE v. ROBERT STEELE.

(Filed 18 November, 1925.)

1. Homicide—Murder—Evidence—Corroboration.

Where there is evidence that the defendant, on trial for the homicide, and the wife of the deceased bore illicit relations to each other, it is competent for the purpose of corroboration for the sheriff to testify to a statement made by him to the wife of defendant soon after the homicide and acquiesced in, "You have been with the defendant four weeks, five different Sundays, and you ought to have been with your husband," on the question of motive of the defendant in committing the act.

2. Same—Appeal and Error—Objections and Exceptions.

Where upon the admission of evidence the court states upon the trial that it is for the purpose of corroboration only, it is not error for him to omit to so state in his instructions to the jury, in the absence of a special request thereto by the defendant.

3. Appeal and Error—Objections and Exceptions—Case.

Exception to an argument of the solicitor to the jury on the trial for a capital felony, made in the statement of case on appeal, comes too late for its consideration by the Supreme Court.

4. Homicide—Evidence—Motive—Appeal and Error—Objections and Exceptions.

Where the evidence tends to show the illicit relations of the prisoner and the wife of deceased, and there is plenary evidence of his having committed the homicide, it is competent for the solicitor to argue this to the jury upon the question of motive, and for the court to include it in his statement of the State's contentions thereon.

5. Criminal Law—Homicide—Evidence—Questions for Jury.

Where the witness has pleaded guilty of murder in the second degree in connection with the homicide for which the defendant was on trial, the weight and credibility of her testimony is for the jury to determine, having a right to believe all or a part of her evidence.

6. Appeal and Error—Objections and Exceptions—Contentions of Parties—Instructions.

Where a party does not object at a proper time to the statement of a contention by the judge in his charge to the jury, and fails to ask in apt time special instructions on that point, his exception for the first time in the record on appeal is unavailing.

7. Homicide—Murder—Premeditation.

The premeditation required to sustain a conviction of murder in the first degree, is that it must have been before the killing, in cold blood, for however short a time in furtherance of a fixed design to gratify a feeling of revenge or to accomplish some unlawful purpose, and not under the influence of a violent passion, suddenly aroused by some lawful or just cause or legal provocation, and subsequent acts may also afford evidence of the defendant's guilt, but flight is not evidence of premeditation and deliberation.

APPEAL by defendant from UNION Superior Court. *McElroy, J.*

Defendant was indicted for the murder of Will Cauthern. From a judgment on a verdict of "guilty of murder in the first degree," defendant appealed. No error.

The State's evidence tended to show that the body of Will Cauthern was found in a branch in Union County, and that his neck had been cut three times. The trachea was cut, as well as all the large veins and muscles of the neck, and the cartilage between the vertebrae was cut almost into the spinal cord. The jugular vein was cut and there was a cut on the back of his head, a blunt cut, or tear, by some blunt instrument with serrated edges. All these cuts went to the bone and death resulted instantly. The gastric nerve was severed, with everything in the neck on the left side; that the cutting of the gastric nerve produces instant death as well as the severing of the carotid artery and jugular vein. The wound in the back of the head appeared to be one blow. There was no evidence of a fractured skull.

On or about 2 May, 1925, at night, the prisoner and Will Cauthern and Mary, his wife, were together on the way to Will Cauthern's house, and while the prisoner and Will Cauthern were walking side by side, the prisoner had a stick, stepped back just a little way, and struck Cauthern a blow. The prisoner had the stick in his hand, and as soon as he struck the deceased, the deceased hollered "Oh," fell, and the defendant immediately began to cut him, and when the prisoner got up and ceased cutting him, he and Mary Cauthern lifted the dead body out of the road, over the fence and put it into a branch.

The State contended, upon the evidence, that the motive of the prisoner in killing the deceased was due to intimate relations between the prisoner and the wife of the deceased.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

H. B. Adams for defendant.

VARSER, J. The defendant's first exception alleges the admission of a statement by the witness, Sheriff Fowler, to Mary Cauthern, while he was talking to her and trying to get her to tell him about the killing, that the prisoner had already told about the killing, when he said to her: "I want you to tell me the truth about this matter, we have suspected you all the time. You have been with Robert four weeks, five different Sundays, and you ought to have been with your husband." The objection was aimed at the latter clause of this statement. The court only admitted the conversation for the purpose of corroboration. Mary Cauthern had testified for the State. The witness Fowler said that after he made this statement to Mary, she denied it, and after she knew that the prisoner had told about the homicide and her part in it, she told about the trip to her house and the killing on the way. The evidence, the whole transaction, was competent for the purpose for which it was admitted. The extent to which it did or did not corroborate Mary Cauthern's testimony was for the jury. Prima facie the *whole conversation with her* was competent.

The defendant relies on *S. v. Parker,* 134 N. C., 209; *Sprague v. Bond,* 113 N. C., 551 and Lockhart's Hand Book on Evidence, sec. 278.

As stated in *Sprague v. Bond, supra,* and in *S. v. Parker, supra,* and *Westfeldt v. Adams,* 135 N. C., on page 600, it was then the rule that the trial judge must, with or without a request therefor, instruct the jury as to the limited purpose for which the corroborative evidence was admitted. However, since the amendment to Supreme Court Rule 27, adopted 16 March, 1904, now Rule 21, 185 N. C., 795: "When testimony is admitted, not as substantive evidence, but in corroboration or contradiction, and that fact is stated by the court when it is admitted, it will not be ground for exception that the judge fails in his charge to again instruct the jury specially upon the nature of such evidence, unless his attention is called to the matter by a prayer for instruction; nor will it be ground of exception that evidence competent for some purposes but not for all, is admitted generally, unless the appellant asks, at the time of admission, that its purpose shall be restricted." *Hill v. Bean,* 150 N. C., 437; *Tise v. Thomasville,* 151 N. C., 281, 283. A mere objection will not do, there must be a request to limit to corroborative purposes. *Elliott v. R. R.,* 166 N. C., 481, 484; *S. v. McGlammery,* 173 N. C., 748. In the absence of a request at the time of admission to limit its purposes, or a request for special instruction in regard to it, a failure to limit this evidence in the charge cannot be assigned as

error. *Beck v. Tanning Co.*, 179 N. C., 123, 127; *Hill v. R. R.*, 180 N. C., 490, 493; *Murphy v. Lumber Co.*, 186 N. C., 746, 748. The record discloses a compliance with the rule.

Exceptions 2 and 3 relate to the remarks of the solicitor in contending that the sheriff's statements to Mary Cauthern, that she had spent five Sundays with the prisoner, and to argue that there was a motive, which had been proved, that the prisoner desired to kill the deceased in order to use his wife for illicit purposes, and that the evidence showed improper relations between the two. Counsel for prisoner did not object at the time or ask any special instructions. The exceptions, made for the first time in the case on appeal, are without merit. The prisoner evidently then thought there was no prejudice to him likely to arise. He did not object at the proper time. It is now too late. *Morgan v. Smith*, 77 N. C., 37, *Harrison v. Chappell*, 84 N. C., 258; *Warren v. Makely*, 85 N. C., 15; *Horah v. Knox*, 87 N. C., 483; *S. v. Suggs*, 89 N. C., 527; *S. v. Sheets*, 89 N. C., 543; *S. v. Lewis*, 93 N. C., 581; *S. v. Powell*, 94 N. C., 965; *S. v. Speaks*, 94 N. C., 865; *Holly v. Holly*, 94 N. C., 96; *S. v. Powell*, 106 N. C., 635; *Hudson v. Jordan*, 108 N. C., 10; *Byrd v. Hudson*, 113 N. C., 203; *S. v. Tyson*, 133 N. C., 692; *S. v. Horner*, 139 N. C., 603; *S. v. Archbell*, 139 N. C., 537; *S. v. Harrison*, 145 N. C., 408; *S. v. Wilson*, 158 N. C., 599.

There was ample evidence to justify the solicitor in arguing to the jury that the evidence showed a motive, and that the prisoner and the wife of deceased had been associating together in a manner that indicated undue familiarity. The prisoner admitted that deceased's wife was with him the Sunday before and the Sunday after the death of deceased. He further said she was at his house one night and slept in the bed between prisoner and his wife, and that he had been taking care of deceased's family when he was away. There were ample circumstances to justify the remarks and it was the duty of the solicitor to argue the whole case, and it is apparent, from the record, that this duty has been performed ably and fearlessly.

Exception numbered 5 shows no merit. There was ample evidence to justify a contention on the part of the State, and for the Court to submit this contention to the jury as to intimate relations between the prisoner and the wife of deceased. The testimony of the defendant fully justified the charge. Usually intimate relations are not susceptible of direct proof, and circumstances have to be relied on, but in the instant case the evidence is both circumstantial and direct.

Exceptions 6 and 7 relate to the stating of the State's contention that Mary Cauthern saw the prisoner "fall back a step and strike Will (the deceased) across the back of the head with the stick." Mary said in her testimony that Robert and Will were in front and "I behind. I

heard a lick and I heard him (Will) holler—Will hollered and when I got up to them he was down on him cutting him—Robert was down on Will Cauthern cutting him." She identified the stick that Robert had when he left his house. She indicated that she was, at the time of the lick, about as far as the witness-stand to the solicitor. The physician's description of the wound on the head of deceased indicated one blow on the back of the head with a blunt instrument—a severe blow tearing the skin in "serrated edges." Mary Cauthern was an accomplice in the crime with the prisoner. She pleaded guilty to a charge of murder in the second degree. The jury had a right to believe all or a part of her testimony, and the argument is amply sustained that, while she said she heard the blow, she was so close, only a few feet according to her indication, and that she saw it. There was no objection then, or later, and no request to correct the statement of contentions. The trial court, at some proper and convenient time in the trial, preferably just before the jury leaves the box, ought to be given an opportunity to restate any contention that may be inaccurate, and a failure so to request or to ask for special instructions on that point eliminates the assignment of error. *S. v. Grady,* 83 N. C., 643; *S. v. Reynolds,* 87 N. C., 544; *Clark v. R. R.,* 109 N. C., 431; *S. v. Tyson,* 133 N. C., 692; *S. v. Davis,* 134 N. C., 633; *S. v. Cox,* 153 N. C., 638; *Phifer v. Comrs.,* 157 N. C., 150; *Jeffress v. R. R.,* 158 N. C., 215; *S. v. Blackwell,* 162 N. C., 684; *S. v. Fogleman,* 164 N. C., 461; *S. v. Cameron,* 166 N. C., 384; *Ferebee v. R. R.,* 167 N. C., 297; *Barefoot v. Lee,* 168 N. C., 90; *Nevins v. Hughes,* 168 N. C., 478; *Ball v. McCormack,* 172 N. C., 682; *S. v. Freeman,* 172 N. C., 925; *S. v. Burton,* 172 N. C., 942; *S. v. Martin,* 173 N. C., 808; *Muse v. Motor Co.,* 175 N. C., 471; *Mfg. Co. v. Building Co.,* 177 N. C., 106; *Bradley v. Mfg. Co.,* 177 N. C., 155; *Futch v. R. R.,* 178 N. C., 284; *Hall v. Giessell,* 179 N. C., 657; *McMahan v. Spruce Co.,* 180 N. C., 637; *Spears v. Power Co.,* 181 N. C., 447; *S. v. Reed,* 181 N. C., 507; *S. v. Hall,* 181 N. C., 527; *S. v. Westmoreland,* 181 N. C., 590; *Green v. Lumber Co.,* 182 N. C., 681; *S. v. Winder,* 183 N. C., 777; *S. v. Sheffield,* 183 N. C., 783; *S. v. Kincaid,* 183 N. C., 709; *S. v. Montgomery,* 183 N. C., 747; *S. v. Baldwin,* 184 N. C., 791; *S. v. Ashburn,* 187 N. C., 723; *S. v. Barnhill,* 186 N. C., 446; *Proctor v. Fertilizer Co.,* 189 N. C., 244.

S. v. Love, 187 N. C., 33, is not an apposite authority for the prisoner. The error in that case was in the violation of a constitutional right of the defendant, when charged with crime, to know the nature of the charge and to confront his accusers and the witnesses against him. In the case at bar the contention of the State was given, and no exception taken at the time or during the trial, and the contention was fully supported by the inferences naturally arising from the evidence. *S. v. Cook,*

162 N. C., 586, cited for prisoner, relates only to an expression of opinion by the trial court. There is no basis for such a contention here.

Exceptions 8, 9, 10 and 11 relate to the failure to charge the jury that there was no evidence of premeditation.

Murder in the first degree is the unlawful killing of a human being with malice, and with premeditation and deliberation. *S. v. Thomas,* 118 N. C., 1118; *S. v. Benson,* 183 N. C., 795. Malice is presumed from the killing of a human being with a deadly weapon. *S. v. Benson, supra.*

"Deliberation means that the act is done in cool state of the blood. It does not mean brooding over it or reflecting upon it a week, a day, or an hour, or any other appreciable length of time, but it means an intention to kill, executed by the defendant in a cool state of the blood, in furtherance of a fixed design to gratify a feeling of revenge, or to accomplish some unlawful purpose, and not under the influence of a violent passion, suddenly aroused by some lawful or just cause, or legal provocation." *S. v. Coffey,* 174 N. C., 814; *S. v. Benson, supra.*

"Premeditation means 'thought before hand' for some length of time however short." *S. v. McClure,* 166 N. C., 328; *S. v. Benson, supra.*

The facts and circumstances and the inferences readily drawn therefrom, are, in the light of the acceptance of the State's contention by the jury, and its refusal to accept the prisoner's plea of self-defense, ample to support a finding of premeditation and deliberation. This support is sufficient and does not include the evidence of secreting the body after the killing.

Subsequent acts, including flight or hiding the body, or burning the bloody clothes and otherwise destroying traces of the crime, are competent on the question of guilt. Wigmore on Evidence (2 ed.), secs. 32, 172, 267, 273, 276 (see elaborate note appended to this section showing the holdings of the Federal and State courts); *S. v. Tate,* 161 N. C., 280; *S. v. Westmoreland,* 181 N. C., 595; *S. v. Hairston,* 182 N. C., 851; *S. v. Collins,* 189 N. C., 20; *S. v. Stewart,* 189 N. C., 347. The basis of this rule is that a guilty conscience influences conduct. From time immemorial it has been thus accepted. "The wicked flee when no man pursueth; but the righteous are bold as a lion."—28 Prov. 1. "Thus conscience doth make cowards of us all."—Hamlet, Act III, scene I. "Guilty consciences always make people cowards."—The Prince and his Minister, Pilpay, chap. III, Fable III.

Flight is not evidence of premeditation and deliberation. *S. v. Hairston, supra; S. v. Collins, supra; S. v. Stewart, supra.*

The requirement, in first degree murder, in order to constitute "deliberation and premeditation" does not require any fixed time beforehand. These mental processes must be prior to the killing, not simul-

taneous, "but a moment of thought may be sufficient to form a fixed design to kill." *S. v. Norwood,* 115 N. C., 790; *S. v. McCormac,* 116 N. C., 1033; *S. v. Covington,* 117 N. C., 834; *S. v. Dowden,* 118 N. C., 1145, 1153; *S. v. Thomas,* 118 N. C., 1113, 1123; *S. v. Exum,* 138 N. C., 599.

This case has been fairly tried by a careful, impartial and learned judge. The solicitor has performed his duty in all respects as becomes one charged with the delicate and important duties of that high office. Counsel for the defendant, appointed by the court to defend the prisoner as we are informed, have conscientiously and ably presented every phase of the situation that showed any hope for relief.

The charge of the court is clear and complete. It applies the law to the evidence so that the jury could not have failed to understand every contention of the State and the prisoner.

The court below explained what is meant by reasonable doubt in the manner indicated in the rulings of this Court. We suggest, in addition to the definitions heretofore approved, for its practical terms, the following: "A reasonable doubt, as that term is employed in the administration of criminal law, is an honest, substantial misgiving, generated by the insufficiency of the proof; an insufficiency which fails to convince your judgment and conscience, and satisfy your reason as to the guilt of the accused." It is not "a doubt suggested by the ingenuity of counsel, or by your own ingenuity, not legitimately warranted by the testimony, or one born of a merciful inclination or disposition to permit the defendant to escape the penalty of the law, or one prompted by sympathy for him or those connected with him." *Jackson, J.,* in *U. S. v. Harper,* 33 Fed., 471.

We have examined all the exceptions, and under well settled principles, are compelled to the conclusion that none of them can be sustained.

Let it be certified that, in the trial of this case, there is

No error.

PAGE TRUST COMPANY AND THOMAS B. WILDER, TRUSTEE, v. R. L. GODWIN AND WIFE, F. J. GODWIN, CITIZENS BANK & TRUST COMPANY OF BENSON, NORTH CAROLINA, AND J. C. JONES, ADMINISTRATOR OF J. M. JONES, DECEASED.

(Filed 18 November, 1925.)

1. Equity—Marshaling Assets.

The doctrine of marshaling assets is purely an equitable remedy, arising when one of two creditors of a common debtor has security for the payment of his debt in addition to that of the other, in which case

he is required by good conscience to first resort thereto, to the end that both creditors may be paid out of the security pledged; and where all the parties are before the court, judgment may be rendered accordingly.

2. Constitutional Law—Equity—Courts—Jurisdiction.

The distinction between equitable rights and remedies have not been abolished by our Constitution, Art. IV, sec. 1, but are administered in the one tribunal.

3. Bills and Notes—Negotiable Instruments—Guarantor of Payment.

A guarantor of payment of a note is unconditionally liable upon default of the maker to pay it when due, to the one to whom the guaranty was made.

4. Equity—Marshaling Assets—Liens — Mortgages — Bills and Notes — Guarantor of Payment.

Where the holder of a first registered mortgage lien on lands and the mortgagor agree that the lien thereof shall be a second one to a lien thereafter acquired, and in consideration thereof and has sold the first registered mortgage note, with his guaranty of payment, to another, and the holder of the first lien has neither actual nor constructive notice of the agreement as to the lien, all parties being before the court: *Held*, the purchaser of the note without notice of the agreement, acquires a first lien, or a priority of payment out of the proceeds of the sale of the land, and the residue, as far as it will extend, to be applied to the satisfaction of the second registered mortgage.

APPEAL by J. C. Jones, administrator of J. M. Jones, deceased, from *Grady, J.*, at March Term, 1925, of CUMBERLAND. Affirmed.

On or about 1 September, 1919, the defendant, Godwin, and wife, executed and delivered to plaintiff, 10 bonds of $1,000 each, $2,000 maturing 1 September, 1921; $2,000 1 September, 1922; $3,000 1 September, 1923; and $3,000 1 September, 1924. Interest from date payable semiannually. The said bonds were secured by a deed in trust of even date to plaintiff, Thomas B. Wilder, trustee, and filed for registration 22 September, 1919, Cumberland County registry, on 122 acres of land in Cumberland County, N. C. At the time of this loan, J. M. Jones, who was then living, had a lien on this land and it was agreed that he should get a part of the money loaned by Page Trust Company to Godwin and cancel his lien, and for the remainder of his debt against Godwin he should take a second mortgage on the land. Jones got the money agreed upon, canceled his lien and a new note for $4,000 from Godwin was executed, secured by mortgage on the 122 acres of land. This note and mortgage was dated 12 September, 1919, after the Page Trust Company deed in trust to Wilder, trustee, and due 30 December, 1920. Notwithstanding the agreement, the J. M. Jones mortgage was filed for record and recorded in Cumberland County prior to the Page Trust Company deed in trust. Sometime later, J. M. Jones executed

to the Page Trust Company, an agreement setting forth the facts and agreed in writing, as follows:

"Now, therefore, in consideration of the premises, and of one dollar in hand paid, the said party of the first part does hereby agree with the Page Trust Company that the said incumbrances of R. L. Godwin to Thomas B. Wilder, trustee, for the Page Trust Company, which is registered in Book 257, page 480, Cumberland County, after the mortgage to said Jones, which is in Book 251, page 59, shall have priority and precedence over the said Jones mortgage, and he does hereby formally waive and relinquish any and all rights to priority in security by reason of said prior registration, and agrees that the said Jones mortgage shall be an incumbrance subsequent to that to said Wilder, trustee, as aforesaid."

The above agreement was dated 15 May, 1923, and duly recorded 1 June, 1923. J. M. Jones before this written agreement was made transferred the $4,000 note and mortgage to the defendant, Citizens Bank & Trust Company, of Benson (hereafter called Bank of Benson for brevity) 4 November, 1919 and the transfer was filed for registration 14 June, 1923. The $4,000 note of R. L. Godwin to J. M. Jones, secured by mortgage, transferred to defendant Bank of Benson, had the following on the back of the note: "We, as endorsers, for value received, hereby guarantee the payment of this note, and interest, with or without due notice of its nonpayment or protest at maturity, or at any time thereafter. R. L. Godwin, J. M. Jones."

The defendant Bank of Benson, advertised under the $4,000 note and mortgage the 122 acres of land in Cumberland County. It was sold to a bidder and J. R. Page increased the bid, in accordance with the statute, and a resale was ordered but not advertised.

This action is brought against R. L. Godwin and wife, J. C. Jones, administrator of J. M. Jones, deceased, and the Citizens Bank & Trust Company of Benson:

(a) For the recovery of the amount due from R. L. Godwin on his notes to the Page Trust Company.

(b) To foreclose the deed of trust securing said indebtedness.

(c) For the equitable marshaling of assets in the event that the court held that the Jones mortgage now held by the Citizens Bank & Trust Company on account of prior registration thereof was a first lien, then that the Citizens Bank & Trust Company be required to proceed against the estate of J. M. Jones upon his endorsement and guaranty of payment of the $4,000 note to the end that the land should be relieved of the lien of said first mortgage as far as might be, and the proceeds of the sale of said land be applied to the satisfaction of the indebtedness

due the Page Trust Company. The defendant, Citizens Bank & Trust Company, filed answer in which it claimed that it held a first lien upon said land on account of prior registration of the Jones mortgage and it purchased the $4,000 note for value before maturity and without any notice of any defect and asked that it be declared a first lien on the land. (The testimony of plaintiff's witness on the trial did not controvert this fact.) And by way of cross-action demanded judgment against the administrator of Jones upon the endorsement and guaranty of said note by said J. M. Jones, and for a foreclosure of the mortgage.

Defendant, J. C. Jones, administrator of J. M. Jones, after answering plaintiffs' complaint, "prays that this action be dismissed, and that he be allowed to go hence without day and recover of the plaintiffs his costs in this action."

From the testimony of witness, J. R. Page, for plaintiff bank, the evidence was in accordance with the above stated facts. Upon the evidence and admission in the pleadings, the court below rendered judgment, in substance:

(1) For $10,000 and interest according to bonds against R. L. Godwin, less credit of $1,531.99, as of 1 June, 1922, in favor of Page Trust Company.

(2) That Bank of Benson recover of R. L. Godwin, as principal and J. C. Jones, administrator of J. M. Jones, deceased, as endorser and guarantor, the sum of $4,000 and interest from 1 December, 1921, and they be taxed with the cost. Godwin, as principal and Jones, administrator, as endorser and guarantor.

(3) Appointing commissioners to sell the land and the fund distributed from the proceeds. Defendant, Bank of Benson, has a first and prior lien on the fund arising from sale of land. As between Page Trust Company and J. C. Jones, administrator of J. M. Jones, the Page Trust Company, under its contract with J. M. Jones is equitably entitled to a first lien thereon and is equitably entitled to have the Bank of Benson proceed against the estate of J. M. Jones for the collection of its judgment to the exoneration of its lien under said mortgage as far as may be.

It is further considered and adjudged by the court that the moneys arising from the sale hereinbefore provided for after deduction of cost and expenses to be allowed by the court be applied as follows: (1) To the satisfaction as far as may be of the judgment herein pronounced in favor of the Bank of Benson, and the residue, if any, to be applied as far as may be to the satisfaction of the judgment herein pronounced in favor of the Page Trust Company, and that the Page Trust Company be and to the extent of any moneys so paid upon the

judgment in favor of the Bank of Benson, subrogated to the rights of the Bank of Benson in its judgment against J. C. Jones, administrator.

From the judgment rendered, J. C. Jones, administrator of J. M. Jones, assigns the following as error and appeals to the Supreme Court:

"That his Honor erred in allowing the paper-writing called a contract between J. M. Jones and the Page Trust Company, registered in Book 299, page 36, to be introduced and read in evidence.

That it was error in his Honor to hold that the plaintiffs, at the close of the evidence, were entitled to the judgment pronounced.

That it was error in giving judgment against the defendant J. C. Jones, administrator of J. M. Jones, as endorser and guarantor.

That it was error to tax the defendant J. C. Jones, administrator, with any of the costs of this action.

That it was error to hold that the Page Trust Company is equitably entitled to have the Bank of Benson proceed against the estate of the said J. M. Jones for the collection of its judgment to the exoneration of its lien under the mortgage.

That his Honor erred in holding that the Page Trust Company is subrogated to the rights of the Bank of Benson in its judgment against J. C. Jones, administrator.

That the motion for judgment as of nonsuit should have been allowed."

Godwin and Bank of Benson did not appeal.

Clifford & Townsend for plaintiff.

Averitt & Blackwell for J. C. Jones, administrator of J. M. Jones, deceased.

CLARKSON, J. In 38 C. J., p. 1366, "Marshaling Assets and Securities," the following is laid down: "The doctrine of marshaling assets is an old equitable doctrine, founded in natural justice and recognized in every enlightened system of jurisprudence governed entirely by principles of equity, well recognized in this country. It is not an absolute rule of law. In some jurisdictions the doctrine is recognized by force of statute, such statutes being merely declaratory of the general equity rule. Marshaling is not founded on contract, nor is it in any sense a vested right or lien, but rests upon equitable principles only and the discretion of the court."

Bynum, J., in *Jackson v. Sloan*, 76 N. C., p. 309, says: "The rule of equity is, that when one creditor can resort to two funds for the satisfaction of his debt, and another to one only of the funds, the former shall first resort to the fund upon which the latter has no claim, as that by this means of distribution both may be paid. And it is an analogous principle of equity that where a debtor whose lands are encumbered by a judgment lien sells one portion of it, the creditor who has a lien upon

that which is sold and upon that which is unsold, shall be compelled to take his satisfaction out of the undisposed of land, so that thus the creditor and the purchaser both may be saved," citing authorities. "But this, however, is never done when it trenches on the rights or operates to the prejudice of the party entitled to go upon both funds," citing authorities. 38 C. J., 1372; *Harrington v. Furr,* 172 N. C., 610; *Brown v. Harding,* 170 N. C., 265; *Graves v. Currie,* 132 N. C., 307; *Pope v. Harris,* 94 N. C., 62.

"Subrogation is the substitution of one who, under the compulsion of necessity for the protection of his own interest, has discharged a debt for which another is primarily liable, in the place of the creditor, with all the security, benefits and advantages held by the latter with respect to the debt. One of the prerequisites to the exercise of the right is the complete discharge of the debt." 2 Beach Mod. Eq. Jur., secs. 797 and 798. *Liles v. Rogers,* 113 N. C., 197; *Grainger v. Lindsay,* 123 N. C., 216; *Fidelity Company v. Jordan,* 134 N. C., 241; *Blacknall v. Hancock,* 182 N. C., 369; *Grantham v. Nunn,* 187 N. C., 394; *Taylor v. Everett,* 188 N. C., 264.

In 37 Cyc., p. 370, it is laid down: "Formerly the right of subrogation was limited to transactions between principals and sureties, but it is no longer confined to cases of strict suretyship, but is broad enough to include every instance in which one party is required to pay a debt for which another is primarily answerable, and which, in equity and good conscience, ought to be discharged by the latter, and is the mode which equity adopts to compel the ultimate discharge of the debt by him who, in good conscience, ought to pay it, and to relieve him whom none but the creditor could ask to pay. Thus where two or more persons are equally liable to the creditor, if as between themselves there is a superior obligation resting on one to pay the debt, the other after paying it may use the creditor's security to obtain reimbursement," etc. We have given the generally accepted definition of the equity of marshaling and subrogation.

Defendant, J. C. Jones, administrator, earnestly contends that subrogation did not apply where there is a remedy at law, and quotes from *Gaston, J.,* in *Scott v. Dunn,* 21 N. C., 428; "The doctrine of substitution which prevails in equity is not founded on contract, but as we have seen on the principles of natural justice." We think this principle of law correct but not applicable on this record. Defendant insists that plaintiff, Page Trust Company, had only a remedy at law. That the introduction of the contract between J. M. Jones and the Page Trust Company of 15 May, 1923, agreeing that the Page Trust Company lien "shall have priority and precedence over the said Jones mortgage," etc., excepted to by all the defendants, should not have been admitted in

evidence. But the record shows that although the Bank of Benson excepted, yet it has acquiesced in the judgment of the court below and makes no appeal. Under the facts as now appearing of record, we cannot hold that this was prejudicial to defendant Jones, administrator.

In marshaling assets, the rule does not apply as between debtor and creditor, it applies only as between different creditors. The defendant debtor, Godwin, makes no defense. The contest is between the creditors of Godwin, the Page Trust Company, J. C. Jones, administrator of J. M. Jones, and the Bank of Benson. All the parties are before the Court. Under our liberal practice, complete justice may and should be done in this action by the record now before us. Multiplicity of suits should not be allowed where justice can be done in one. Our Constitution in part says: Art. IV, sec. 1: "The distinction between actions at law and suits in equity and the forms of all such actions and suits shall be abolished, and there shall be in this State, but one form of action for the enforcement or protection of private rights or the redress of private wrongs, which shall be denominated a 'civil action,'" etc. Distinction between and forms of action at law and suits in equity are abolished under our Constitution, but does not destroy equitable rights and remedies nor does it merge legal and equitable rights. *Furst v. Merritt, ante,* 397; *Waters v. Garris,* 188 N. C., p. 310.

The record now before us shows: That Godwin owes the debts. He is the debtor. He made (1) to secure bonds aggregating $10,000, a deed in trust on 122 acres of land in Cumberland County for the benefit of plaintiff, Page Trust Company; (2) to secure $4,000 bond, a mortgage to J. M. Jones on the same land. J. M. Jones is dead and J. C. Jones is his administrator. J. M. Jones in his lifetime, transferred his $4,000 note, secured by mortgage, to the Bank of Benson before maturity and guaranteed the payment. The bank was an innocent purchaser for value. The $4,000 lien was registered first, giving the Bank of Benson the first lien, and the $10,000 lien was registered subsequently. Sometime afterwards, J. M. Jones signed a paper-writing, which we construe to be a contract, that the $10,000 lien should have had priority and precedence over the $4,000 lien he had assigned to the Bank of Benson and the lien of the bank should be a subsequent encumbrance. The Bank of Benson, a defendant, by way of cross-action, demanded judgment against J. C. Jones, administrator of J. M. Jones, upon the endorsement and guaranty of the $4,000 note secured by mortgage. From the language on the back of the note: "We as endorsers, for value received, hereby guarantee the payment," etc., whether the judgment against Jones, administrator, as endorser and guarantor both was correct or not, is immaterial. Treated as a guarantor, defendant Jones, administrator, contends it was error; that Jones' liability ceased when it was

made to appear that the Bank of Benson had sufficient security with which to pay the indebtedness due it. We cannot so hold.

In *Carpenter v. Wall*, 20 N. C., p. 279, *Daniel, J.*, defines a guaranty as follows: "A guaranty is a promise to answer for the payment of some debt, or the performance of some duty, in case of the failure of another person who is himself in the first instance liable to such payment or performance. Fell on Guaranties, 1; Smith on Mercantile Law, 277." *Beecker v. Saunders*, 28 N. C., 380; *Spencer v. Carter*, 49 N. C., 287; *Carter v. McGehee*, 61 N. C., 431; *Coleman v. Fuller*, 105 N. C., 328, 329; *Cowan v. Roberts*, 134 N. C., 415; *Grocery Company v. Early*, 181 N. C., 459.

Shepherd, J., in *Jenkins v. Wilkinson*, 107 N. C., 709, says: "There is plain distinction between a guaranty of payment and a guaranty of collection. 'The former is an absolute promise to pay the debt at maturity, if not paid by the principal debtor, and the guarantee may begin an action against the guarantor. The latter is a promise to pay the debt upon the condition that the guarantee shall diligently prosecute the principal debtor without success.' *Jones v. Ashford*, 79 N. C., 173 and Baylie's Sureties and Guarantors, 113." *Hutchins v. Bank*, 130 N. C., 285; *Cowan v. Roberts, supra; Voorhees v. Porter*, 134 N. C., 601.

28 C. J., p. 895, says: "An absolute guaranty is one by which the guarantor unconditionally promises payment or performance of the principal contract on default of the principal debtor or obligor, the most usual form of an absolute guaranty being that of payment, such as of the payment of commercial paper; but an absolute guaranty of performance is placed on the same ground, and subject to the same rules, as a guaranty of payment. A guaranty is deemed to be absolute unless its terms import some condition precedent to the liability of the guarantor. In order to bind the guarantor under an absolute guaranty it is not necessary that there should be notice of acceptance of the guaranty, or notice of the default of the principal, or that any steps should be taken to enforce the contract guaranteed against the principal, and the fact that these acts are not necessary in order to bind the guarantor distinguishes an absolute guaranty from a conditional guaranty, in which case these acts are a prerequisite to holding the conditional guarantor liable."

It is well settled that a guarantor of the payment of a note, as in the present case, may be sued at any time after default by the party for whom the guaranty was made. It was not incumbent, under J. M. Jones' guaranty, for the Bank of Benson to first resort to the security and sell under the mortgage. The judgment of the Bank of Benson against J. C. Jones, administrator of J. M. Jones, was correct. From the record we have the status of the parties fixed: The Bank of Benson (1)

a judgment against J. C. Jones, administrator of J. M. Jones, for $4,000; (2) a mortgage on 122 acres of land to secure the $4,000 debt. Page Trust Company, a lien debt for $10,000 on the 122 acres of land, subject to the Bank of Benson debt, and under the J. M. Jones contract a priority and precedence over the Bank of Benson debt.

In 38 C. J., p. 1371, it is said: "The operation of the principle of marshaling is not affected by the nature of the property which constitutes the double fund, but applies whenever a paramount creditor holds collateral security, or can resort collaterally to other real or personal estate for the satisfaction of the debt. However, an imperfect personal obligation, that is, one that cannot be enforced by suit, is not a security which can be marshaled. . . . As a general rule, before the doctrine of marshaling assets will be applied, there must be two funds or properties, at the time the equitable relief is sought, belonging to the common debtor of both creditors, on both of which funds one party has a claim or lien, and on one only of which the other party has a claim or lien."

Although strictly speaking the judgment against J. C. Jones, administrator of J. M. Jones, does not constitute a fund, yet plaintiff, Page Trust Company, under the priority contract with J. M. Jones, would be entitled to judgment against J. C. Jones, administrator of J. M. Jones, and the Bank of Benson has a judgment for the amount in this suit. All parties being before the Court analogous to marshaling, we think natural justice, equity and good conscience require that the judgment of the court below should not be disturbed. Exact justice has been done all the parties before the Court—that is the fundamental principle of equity. We do not think the taxing of cost in the court below was prejudicial.

The judgment below is

Affirmed.

JOSEPH H. SHIELDS ET AL. v. JAMES A. HARRIS ET AL.

(Filed 25 November, 1925.)

1. Estates—Forfeiture—Conditions Subsequent—Deeds and Conveyances.

A deed to lands with a condition subsequent that may work a forfeiture and reëntry must contain sufficient words, such as "provided," "so as," "on condition" or other like expressions, to so declare the intent of the grantor therein, except in instances where the law, from the nature of the subject-matter, or the contemplation of the parties, implies a condition with forfeiture and reëntry which interpretation is not favored by law.

2. Deeds and Conveyances—Interpretation—Conditions Subsequent.

The entire instrument will be looked to in interpreting the intent of the grantor in a conveyance of land upon conditions subsequent that may work a forfeiture and right of reëntry.

3. Same—Trusts—Cessation of Personal Trust—Actions—Parties.

The right to enforce a trust rests only with the trustees or *cestui que trust*, or those having an interest therein, and where lands are conveyed to trustees for the purpose of its use as a burial ground, reserving the right in the grantor to bury or permit the burial of certain ones he may designate, the reservation of this right is personal to the grantor, and ceases at his death.

4. Same—Interests.

The doctrine of following a trust fund only permits one who has an interest therein to maintain an action to recover the funds, or the property purchased with the trust funds.

5. Same—Statutes—Courts—Jurisdiction—Equity—Cemeteries—Burial—Police Powers.

The rights of burial are peculiar and somewhat of a public nature, subject to the police powers, and the Legislature and the courts, according to jurisdiction, may authorize a sale of lands granted for the purpose of burial of the dead, where the city has enlarged and grown around the property, and provided another place for the burial of the bodies.

6. Same—Equity.

Equity will not enforce a trust in violation of a valid statute applicable to its subject-matter.

APPEAL by plaintiffs from GUILFORD Superior Court. *Schenck, J.*

Action to recover land in the city of Greensboro, and damages. From a judgment as upon nonsuit, plaintiffs appealed. Affirmed.

The following are the material facts:

That Robert Moderwell and Andrew Fountain, the owners in fee and in possession of a tract or parcel of land in Guilford County, North Carolina, described as follows: "Beginning at a corner on Fountain land running north 6.33 rods; thence running north 6.33 rods on Robert Moderwell's land to a corner; thence due east 12.65 rods to a stake; thence south 6.33 rods to a stake; thence 6.33 rods on Fountain land to a corner; thence due west 12.65 poles to the beginning, containing one acre; 'This lot or parcel of land is known as the Old Methodist Burying Ground' "; on 14 March, 1836, executed and delivered a deed, conveying said land, to Robert Mitchell and others as trustees of the Methodist Episcopal Church and their successors in office, which deed is in usual form, but containing these terms: "In trust for the uses and purposes hereinafter mentioned and declared," and in the habendum clause this: "In trust that they shall appropriate and set apart said piece or parcel of land as a burying ground for the use of the Methodist Episcopal

Church, and further, that the said Andrew Fountain shall have the full and free privilege of interring in said grave-yard all his relations and such other as he may think proper." With a provision for the appointment of the successors to the named trustees according to the statutes, which deed was registered 26 January, 1839.

That by authority contained in said deed, the grantees in said deed went into possession of the property and held the same under said deed, and that the same was used as a burying ground in accordance with the stipulations contained in said deed, and became known as the "Old Methodist Burying Ground."

That on 12 February, 1907, the General Assembly of North Carolina enacted the following private law, known as chapter 67, Private Laws of 1907:

"CHAPTER 67, PRIVATE LAWS 1907.

"The General Assembly of North Carolina do enact:

"SECTION 1. That S. W. Trogden, J. A. Odell, M. Lamb, W. H. Turner, W. E. Coffin, W. F. Alderman, Jr., J. N. Richardson, G. Will Armfield, and Thomas J. Copeland, Trustees of West Market Street Methodist Episcopal Church, South, Greensboro, Western North Carolina Conference, and their successors in office, are authorized and empowered to remove and reinter in suitable lots in Green Hill Cemetery, Greensboro, North Carolina, and in a decent and suitable manner, the remains of bodies buried in a lot or tract of land known as the Methodist Burying Ground, situate in the southern part of Greensboro, North Carolina, and east of South Ashe Street, in said city, which forms its eastern boundary; together with the stones and slabs marking the graves, such stones and slabs to be replaced at their respective graves in the plots in said Green Hill Cemetery.

"SEC. 2. That the said trustees shall give thirty days notice in a newspaper published in Greensboro, North Carolina, of their purpose to remove and reinter said remains as provided above; and, at the request of the next of kin of any person whose remains are buried at said Methodist Burying Ground, said remains shall be turned over to said next of kin so applying to be interred at any place they desire."

That the parties named in said act are successors in office to the trustees named in the deed hereinbefore referred to.

That pursuant to the provisions of said act the bodies interred in the old Methodist Burying Ground were removed from said burying ground in March, 1917, and reinterred in Green Hill Cemetery, Greensboro, North Carolina, by the parties named in the preceding paragraph.

That on or about 4 October, 1901, the governing body of the city of Greensboro passed an ordinance, to wit:

"That no person shall bury or cause to be buried any dead bodies in any other place within the city limits other than Green Hill or Union Colored Cemetery, and any one so offending, a penalty of $25.00 shall be imposed."

It is admitted that the Trustees of West Market Street Methodist Episcopal Church, South, successors in office to the trustees described in the original deed from Fountain and Moderwell, on 10 January, 1919, sold and conveyed to the defendants, James A. Harris, J. H. Dillard and C. O. Payne, since deceased, the land known as the "Old Methodist Burying Ground," and that said parties entered into possession of said land under said deed, claiming the same as their own private property.

That Robert Moderwell died in the year 1836, leaving a will duly probated in the office of the clerk of the Superior Court of Guilford County, in Book of Wills B, at page 556.

That by the terms of said will, all the rest and residue of his estate, both real and personal, was devised and bequeathed to his wife, Martha Moderwell, except such as was excepted to her and her heirs forever in said will. It is further admitted that there was no exception made of the lands described in the complaint, and that no special reference was made to said lands in said will.

That in 1867, Martha Moderwell died leaving a will which was duly probated in the office of the clerk of the Superior Court of Guilford County, in Book of Wills D, at page 347. That under the terms of the will of the said Martha Moderwell, she gave and bequeathed to her nieces Mary Shields, Martha Shields, Rachel Shields, Julia Shields, Hybernia Shields and Nancy Shields, the rest and residue of her estate, real and personal, to be equally divided between them share and share alike, to them and each of them, their heirs and assigns forever. No special reference was made in said will to the lands in controversy.

That this suit was instituted on 15 January, 1924.

That on 7 January, 1922, the defendants, Payne and Harris, and their wives conveyed to the defendant Dillard, their two-thirds interest in a part of the land conveyed to Payne, Harris and Dillard by the trustees of West Market Street Methodist Episcopal Church; that thereafter the said Dillard and wife conveyed to the defendant, John W. Simpson, trustee, the said portion of said land to secure an indebtedness of $3,000 therein secured, which said deed of trust is recorded in Book 378, at page 100, said deed of trust being dated 7 January, 1922, recorded 12 January, 1922.

That by deed recorded in Book 327, at page 2, in the office of the register of deeds for Guilford County, dated 10 May, 1919, the defendants, Dillard and Payne, and their wives conveyed to the defendant Harris their two-thirds interest in a part or parcel of the land described

in deed to said three defendants from the trustees of the West Market Street Church; that thereafter said Harris and wife conveyed the same to J. F. Stephens, trustee, by deed of trust recorded in the office of the register of deeds of Guilford County, in Book 337, at page 223, on 9 April, 1921, to secure an indebtedness of $2,000.

That since the commencement of this action C. O. Payne died intestate and without issue, and his wife, Bessie Payne, and his brothers, to wit: Rodney Payne and John Payne, and his sisters, to wit: Sylvia Payne, Eliza Payne, being all and his only heirs at law, and Bessie Payne, his duly qualified administratrix, pursuant to order of the court duly issued, were made parties to this action.

That since the commencement of this action James I. Fountain has died testate, and his will was duly probated in Book of Wills J, at page 246, in the office of the clerk of the Superior Court of Guilford County, North Carolina, 26 March, 1924, which said will contained the provision that said James I. Fountain devised all his right, title and interest to the land in controversy to his wife, Jennie L. Fountain.

It is admitted that the annual rental value of said tract of land is $25.00 per year; that at the time of the beginning of this action and since, James A. Harris, J. H. Dillard and the heirs of C. O. Payne, and Jessie Davis, were in possession of this land and are still in possession thereof; that James I. Fountain is the heir at law of Andrew Fountain; that the plaintiffs other than Jennie L. Fountain, are related to Robert Moderwell, the other grantor in the original deed; that if the plaintiffs, other than Jennie L. Fountain, have any interest in the land described in the complaint, which the defendants deny, that such interests are the interests alleged in the complaint; that if Jennie L. Fountain has any interest in said land, which the defendants deny, the same is an undivided one-half interest therein.

R. C. Strudwick, V. S. Bryant, and Adams & Adams for plaintiffs.
Hoyle & Harrison, Hines & Kelly, and J. S. Duncan for defendants.

VARSER, J. A condition subsequent with a clause of reverter does not appear in the deed recited nor does it arise by clear implication. *Braddy v. Elliott,* 146 N. C., 578. No apt words are used to indicate an intention to create a condition subsequent which will work with a forfeiture. To every good expressed condition is required an external form, that is, sufficient words to declare an intent in the party to have the estate conditional, and an internal form, that is, such matter as whereof a condition may be made. Shep. Touchstone, vol. 1, *126 (241); *Scantlin v. Garvin,* 46 Ind., 262. The proper subject-matter exists, but the instant deed does not contain the "sufficient words."

The usual and proper technical words, such as "provided," "so as," "on condition," or those mentioned by Lord Coke when he says: "Words of condition are *sub conditione, ita quod, proviso,*" or the words *"si"* or *"quod contingat"* and similar terms with the clause of forfeiture or reëntry. Coke on Littleton, 203 a, 203 b, 204 a; *Stanley v. Colt,* 72 U. S., 119; *Hall v. Quinn, ante,* 326. Conditions subsequent which work a forfeiture divesting estates are not to be raised readily by inference or argument, for they are not favored by the law. *Hall v. Quinn, supra; Church v. Bragaw,* 144 N. C., 126; *Rawson v. School District,* 89 Mass., 125 (7 Allen's Rep., 125); *Scovill v. McMahon,* 62 Conn., 378, 21 L. R. A., 58; *Thompson v. Hart,* 66 S. E., 270 (Ga.); 2 Devlin on Deeds, paragraph 970; *Kilpatrick v. Mayor of Baltimore,* 81 Md., 179; *Griffitts v. Cope,* 17 Pa. St., 96; *Mahon v. Gormley,* 24 Pa. St., 81; *Methodist Episcopal Church of Columbia v. Old Columbia Public Ground Co.,* 103 Pa. St., 608; *Jones v. Renshaw,* 130 Pa. St., 327; *Estate of Richard Smith,* 181 Pa. St., 109; *Baldwin v. Atwood,* 23 Conn., 367; Mordecai's Law Lectures, 550; Tiffany on Real Property, vol. 1, 270, paragraph 79; *Weller v. Brown,* 160 Cal., 515; *Williams v. Vanderbilt,* 145 Ill., 238; *Peden v. Chicago, Rock Island & Pacific Ry. Co.,* 73 Iowa, 328; *Cunningham v. Parker,* 146 N. Y., 29, 11 L. R. A. (N. S.), 513; *R. R. v. Carpenter,* 165 N. C., 465; *Emerson v. Emerson,* 43 N. H., 476, 80 Am. Dec., 184; *Whitton v. Whitton,* 32 N. H., 163, 75 Am. Dec., 163; *Ry. v. Honaker,* 66 West Va., 136; *Henry Rahr's Sons Co. v. Buckley,* 159 Wis., 589; *Sohier v. Trinity Church,* 109 Mass., 1. This rule does not necessarily apply to conditions implied by law, or where, from the nature of the subject-matter, or the contemplation of the parties, the condition with forfeiture is implied, as in timber deeds (*Williams v. Parsons,* 167 N. C., 529, 531; *Gilbert v. Shingle Co.,* 167 N. C., 286; *Hornthal v. Howcott,* 154 N. C., 228; *Bateman v. Lumber Co.,* 154 N. C., 248; *Bunch v. Lumber Co.,* 134 N. C., 116; *Lumber Co. v. Corey,* 140 N. C., 462; *Hawkins v. Lumber Co.,* 139 N. C., 160; *Strasson v. Montgomery,* 32 Wis., 52; Mordecai's Law Lectures, 548, 549; *Woody v. Timber Co.,* 141 N. C., 471), or in mining leases. (*Conrad v. Morehead,* 89 N. C., 31; *Maxwell v. Todd,* 112 N. C., 677; *Hawkins v. Pepper,* 117 N. C., 407).

Although certain words are appropriate for the creation of a condition, no particular words are necessarily required, for rules of construction are guides to find the intention of the parties expressed by the whole instrument. Tiffany on Real Property, 268; 4 Kent Com., *132 (142) *Church v. Bragaw, supra; Stanley v. Colt,* 5 Wallace (U. S.) 119; *Perkins v. Kirby,* 35 R. I., 84; *McCain v. Ins. Co., post,* 549. When ascertained, the intention of the parties, as expressed in the instrument, will prevail, although it may divest the estate.

Applying the foregoing principles, we are of opinion that the deed does not create a condition subsequent; therefore, it does not authorize a reëntry as upon condition broken.

Plaintiffs, however, do not rest their case solely upon the claim of condition broken, but assert that the words employed are apt to create a trust. *Hall v. Quinn, supra.* They contend that the trust has failed and a resulting trust has arisen in favor of them as representing the grantors.

Assuming, but not deciding, that the words employed do create a trust, we are of the opinion that the plaintiffs are not entitled to prevail as upon a failure of the trust. Resulting trusts arise in several ways, but the following classification is convenient: "(1) Where a purchaser pays the purchase money, but takes the title in the name of another; (2) where a trustee or other fiduciary buys the property in his own name, but with trust funds; (3) where the trusts of a conveyance are not declared, or are only partially declared, or fail; and (4) where a conveyance is made without any consideration, and it appears from circumstances that the grantee was not intended to take beneficially." Bispham's Equity, 9 ed., 146; *Avery v. Stewart,* 136 N. C., 426; *Williams v. Williams,* 108 Iowa, 91. Plaintiffs claim to come within the third division, where there is a total failure of the trust.

The entire estate was granted in this deed, nothing was reserved. There is no provision that, if the trust is not performed or fails, the title would revert to the grantors or their heirs or assigns. It is not contended that the plaintiffs are members of the church for which the trust was created. The trust, when created, concerns, in a legal sense, only the trustees and the *cestuis que trustent.* The right on the part of Andrew Fountain to exercise certain burial rights in the *locus in quo* is plainly personal to him, and ceased upon his death. The plaintiffs cannot maintain this action on account of a lack of legal interest in the trust to support a prayer for equitable relief to the end that the trust may be performed. *Kilpatrick v. Graves,* 51 Miss., 432; *Strong v. Doty,* 32 Wis., 381; *Baldwin v. Atwood, supra; Rawson v. Uxbridge, supra,* 26 R. C. L., 1361; *Faulkner v. Davis,* 18 Grattan (Va.), 651, 98 Am. Dec., 698; *Thompson v. Childress,* 4 Baxt. (Tenn.).

The parties who can maintain a suit to enforce a trust must be either a *cestui que trust* or a trustee, or must sue in right of one of these or must have some legal interest in the subject matter of the trust either granted, or reserved, or by reverter. *Female Association v. Beekman,* 21 Barb. (N. Y.), 565; *Warren v. Warren,* 75 N. J. Eq., 415; Perry on Trusts, 2 vol., 1430, paragraphs 873-890.

In this State analogous rulings indicate the rule announced herein. *Cooper v. Landis,* 75 N. C., 526; *Cheshire v. Cheshire,* 37 N. C., 569; *Younce v. McBride,* 68 N. C., 532.

The doctrine of following trust funds only permits one who has an interest therein to maintain an action to recover the funds or the property purchased with the trust funds. *Monroe v. Trenholm,* 112 N. C., 634.

The husband and father was not allowed to sue to establish a trust for his wife and children even when he alleged that he was a beneficiary in the same trust in *Cavenaugh v. Jarman,* 164 N. C., 372.

The Legislature gave the full power and authority to remove the bodies from this "burying ground," and the city of Greensboro, by legislative action prohibited the burying of dead bodies there, and the change of conditions around this land in the growth of the city, made this land wholly out of keeping with the benevolent wishes that prompted the conveyance in 1836. The then dreams of its most enthusiastic citizens could not contemplate the present growth of Greensboro, and all the changes that are incidental to its expansion. Parallel facts appear in *Sohier v. Trinity Church, supra.*

Rights of burial are peculiar and are somewhat of a public nature and are subject to the police power. It often becomes necessary to remove tombs and burial grounds. *Sohier v. Trinity Church, supra; Brick Presbyterian Church v. New York City,* 5 Cowen, 538. This latter case holds constitutional an act of 1823, prohibiting the use of a cemetery on lands conveyed for that purpose in 1766. *Coats v. New York City,* 7 Cowen, 585. All individual rights of property are subject to legislation belonging to the class of police regulations. *Com. v. Alger,* 7 Cush. (Mass.), 53; *Dingley v. Boston,* 100 Mass., 544.

The Legislature, or a court of equity, may authorize a sale of charitable trust property under the needs arising from the exercise of police power by that division of government having jurisdiction of the *locus in quo. Stanley v. Colt, supra; Old South Society v. Crocker,* 119 Mass., 1. Certainly a court of equity would not now disapprove what it would have authorized in the first instance.

When, in the trend of growth and development, the law made the further use of this burying ground illegal, and the conditions in that vicinity made its continuance as a place for the repose of bodies buried there, in accord with feeling of respect and veneration, which happily prevail among English speaking peoples, undesirable, it was not a violation of the trust, when concurred in by all the *cestuis que trustent* to make a sale of the grounds after a removal of the bodies. The law had in effect repealed the requirement to use it as a cemetery. 4 Kent Com., 130; *Brick Presbyterian Church v. New York, supra; Scovill v. McMahon, supra.* This is true whether the deed be construed as containing a condition subsequent or creating a trust. *Doe v. Church Wardens of Rugeley,* 6 Q. B., 114; *Brewster v. Kitchell,* 1 Salk., 198;

Peart v. Taylor, 2 Bibb., 556; *Martin v. Ballou,* 13 Barb., 132; *Finlay v. King,* 28 U. S., 346; *Taylor v. Sutton,* 15 Ga., 103, 60 Am. Dec., 682; *U. S. v. Arrendondo,* 31 U. S., 745.

Equity will not enforce a trust so as to require the violation of law. "Equity follows the law" and does not violate it.

We have considered this in the light of the contention that the plaintiffs are the proper parties to assert their claims in right of the grantors. However, we call the attention of the profession to the inability of devisees, assignees, or other than heirs, to assert title under a reverter upon breach of condition subsequent after the death of the grantor. *Sharpe v. R. R., ante,* 352; *Cross v. Carson,* 44 Am. Dec., 742, 759; *Thompson v. Thompson,* 68 Am. Dec., 649.

The following cases have sanctioned sales of property, under variant, but somewhat similar, deeds: *St. James v. Bagley,* 138 N. C., 394; *Hayes v. Franklin,* 141 N. C., 599; *Church v. Bragaw, supra; Church v. Ange,* 161 N. C., 314; *Fisher v. Fisher,* 170 N. C., 381; *Middleton v. Rigsbee,* 179 N. C., 440; *Snyder v. Asheboro,* 182 N. C., 708.

In *Page v. Covington,* 187 N. C., 621, the decision was based on the peculiar language of the deed, and the use of the funds to be derived from the sale was admitted and not debated.

We are of the opinion that, under the facts on this record, an absolute title vested in the grantees, Harris, Dillard, and Payne, under the deed of 10 January, 1919, and that the judgment appealed from must be

Affirmed.

STATE v. THOMAS E. COOPER.

(Filed 25 November, 1925.)

1. Actions—Consolidation—Banks and Banking—Loans—Statutes—Misdemeanors—Criminal Law.

An indictment charging the officer of the bank of violating C. S., vol. III, 222(i), and also unlawfully making loans for the bank to certain persons in excess of the maximum percentage of the capital stock and permanent surplus, C. S., vol. III, 220(d), alleges the commission of crimes of the same class, where there are two indictments thereof against the same person, that may be consolidated and tried together by the court.

2. Same—Officers.

A bank must act through its officers, and where they have violated the provisions of C. S., vol. III, secs. 222(i) and 220(d), as to lending the bank's money, the offense is committed by the officers under the meaning of the statute, and they are individually indictable therefor.

3. Same—Capital and Surplus.

The statute requiring a bank to keep as a reserve on hand, instantly available, funds in an amount equal to at least 15% of its aggregate demand deposits, etc., means all deposits the payment of which can be legally required within thirty days, C. S., vol. III, 216(a), this reserve consisting in cash on hand, balance payable on demand due from other approved solvent banks designated as depositors, C. S., vol. III, 220(g), by resolution of the board of directors approved by the Corporation Commission. C. S., vol. III, 221(g).

4. Same—Corporation Commission—Receivers.

The Corporation Commission must require a bank that has not the surplus required by statute, to make it good, and upon its failure to do so within thirty days, may take possession of its property and business. C. S., vol. III, 222(i).

5. Same.

The statutory limitation upon a bank making loans to any one person or class of common interests, does not apply to loans, or extensions or renewals thereof, existing at the date of the ratification of the statute, C. S., vol. III, 220(d), and under the later act, C. S., vol. III, 224(i), the unlawful act thus committed is made a misdemeanor, and is punishable as such at the discretion of the court.

6. Same—Intent—Pleadings—Evidence.

A conviction may be had of a bank officer who violates the statutory inhibition as to making of loans, etc., and he may be convicted without allegation or evidence of an intent to defraud the bank, or others.

7. Banks and Banking—Loans—Statutes—Officers—Parties.

Where the official position of an officer of a bank is such as necessarily to acquaint him of the violation of the statute respecting the making of loans, and to fix him as a party thereto, it is sufficient evidence to sustain his conviction of the misdemeanor therein prescribed. C. S., vol. III, secs. 221(e), 222(i).

VARSER, J., not sitting.

APPEAL by defendant from *Grady, J.*, at November Term, 1924, of NEW HANOVER. No error.

At September Term, 1923, of said court, two bills of indictment charging defendant, and another, with violations of the banking law of this State were returned as true bills. In one, it was charged that Joseph C. Rourk and Thomas E. Cooper, officers of the Liberty Savings Bank, a corporation engaged in the banking business under the laws of this State, at Wilmington, N. C., did on .. January, 1923, unlawfully and wilfully make loans or discounts for and on behalf of said bank, when the reserve was below the amount required to be maintained by law, against the form of the statute, etc.; in the other, it was charged that Joseph C. Rourk, cashier and director, and Thomas E. Cooper, president and director of said Liberty Savings Bank, both being also members of

the finance committee of its board of directors, did on .... January, 1923, unlawfully and wilfully make, obtain or procure from said bank, loans in excess of 25 per cent of the capital stock and permanent surplus of said bank (1) to C. W. Lassiter, (2) to Thomas E. Cooper and (3) to C. E. Wendlenger, against the form of the statute, etc. The violations of the statute with respect to each loan alleged in the latter indictment were charged in separate counts. Both defendants entered pleas of not guilty.

These indictments came on for trial at November Term, 1924, upon said pleas. They were consolidated and tried together. There was a verdict of guilty upon both indictments as to Thomas E. Cooper. From the judgments upon the verdict, defendant appealed. The appeal was heard at the close of the Spring Term, of this Court, and was then continued, upon an *adversari,* to this term.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

Herbert McClammy and W. F. Jones for defendant.

CONNOR, J. Defendant excepted to the order of the court consolidating the two indictments, in accordance with which they were tried together. This exception is the basis of the first assignment of error.

Each indictment charges violations of the banking laws of North Carolina; one, that defendant, an officer of the Liberty Savings Bank, unlawfully and wilfully made loans for said bank when its reserve was below the statutory requirement. Public Laws 1921, chap. 4, sec. 71; C. S., vol. III, 222(i); the other, that defendant, as president, director and member of the finance committee, unlawfully and wilfully made loans for said bank to persons named therein, the total amount loaned to each of said persons being in excess of the maximum percentage of the capital stock and permanent surplus of said bank, fixed by statute as the limitation of the total direct and indirect liabilities of any person, firm or corporation for money borrowed from a bank, Public Laws 1921, chap. 4, sec. 29; C. S., vol. III, 220(d).

The acts alleged in both indictments are forbidden and made unlawful by the same statute. If such acts constitute crimes or criminal offenses, then they are crimes of the same class, that is, misdemeanors, with the same maximum punishment prescribed by law. Public Laws 1921, Extra Session, chap. 56, sec. 4. There is express statutory authority for the order made by the court, and for the trial of the two indictments together, pursuant to said order. C. S., 4622. *S. v. Jarrett,* 189 N. C., 516; *S. v. Malpass,* 189 N. C., 349; *S. v. Mills,* 181 N. C., 530. There was no error in the order of consolidation. The first assignment of error cannot be sustained.

Defendant, by exceptions duly taken during the progress of the trial, presents to this Court his contention that the acts alleged in the indictments herein do not constitute crimes or criminal offenses, under the laws of this State—at least, do not constitute crimes or criminal offenses for which defendant, as an officer or director of the bank may be convicted and punished. This contention must be sustained unless such acts when committed by the bank or by its officers or directors are made crimes by statute. They are not crimes at common law.

The General Assembly of North Carolina has provided by statute for the regulation of banks, conducted under the laws of this State, and for a thorough supervision of those engaged in the business of conducting them. The term "bank" shall be construed to mean any corporation, partnership or individual engaged in the business of receiving, soliciting or accepting money or its equivalent on deposit. Penalties are prescribed by the statute to secure compliance with its provisions, in some instances to be imposed upon the bank, in others upon its officers or directors, upon failure to comply therewith. Public Laws 1921, chap. 4, and amendments; C. S., vol. III, chap 5.

It is therein provided that every bank shall at all times have on hand or on deposit with approved depositories, instantly, available funds in an amount equal to at least 15 per cent of the aggregate amount of its demand deposits, and 5 per cent of the aggregate amount of its time deposits. "Demand deposits" are defined as all deposits, the payment of which can be legally required within thirty days; "time deposits," as all deposits, the payment of which cannot be legally required within thirty days. Public Laws 1921, chap. 4, sec. 1; C. S., vol. III, 216(a). The reserve required shall consist of cash on hand, and balances payable on demand, due from other approved solvent banks which have been designated as depositories, (sec. 32, C. S., vol. III, 220(g) by resolution of the board of directors and approved by the Corporation Commission. Sec. 55, C. S., vol. III, 221(g). When the reserve falls below the statutory requirement, the bank shall not make new loans or discounts, other than by discounting or purchasing bills of exchange payable at sight or on demand. The Corporation Commission shall require any bank, whose reserve has fallen below the statutory requirement, immediately to make good such reserve, and upon failure of the bank within 30 days to make such reserve good, the commission may forthwith take possession of the property and business of said bank. Sec. 71, C. S., vol. III, 222(i).

It is further provided by said statute that the total direct and indirect liabilities of any person, firm or corporation for money borrowed from any bank, including in the liabilities of a firm the liabilities of the

several members thereof, shall at no time exceed 25 per cent of the capital stock and permanent surplus of any bank having a paid in capital stock of $250,000 or less; this limitation upon loans does not apply to loans or extensions and renewals thereof existing at the date of the ratification of the act. Sec. 29, C. S., vol. III, 220(d). The limitation applies only to new loans made after the ratification of the act of 1921. No specific power is conferred upon the Corporation Commission with reference to the enforcement of this provision, nor is there any specific penalty prescribed for its violation by the bank, or by its officers and directors. For amendment of this section, not material, however, to the decision of the questions presented by this appeal, see Public Laws 1925, chap. 119.

The foregoing are the only provisions of the act of 1921, as ratified on 18 February, 1921, relative to loans by a bank when its reserve is below the statutory requirement, or relative to limitations upon the amount which may be loaned by a bank to any person, firm or corporation. It will be noted, however, that loans in violation of either provision are forbidden by the statute. The making of such loans is unlawful. The wisdom of these two provisions is manifest; banks, whose business is conducted in strict compliance with these two provisions, seldom become insolvent, and thus bring loss and disaster upon depositors and stockholders, and usually, also, upon others who may have no direct interest in the insolvent bank, but who nevertheless suffer by reason of the loss sustained by those who do have such interest. These provisions, although arbitrary as to details are supported in principle by the lessons taught in the school of experience—said to be the best of teachers.

Doubtless, the General Assembly, at the regular session of 1921, thought that the inclusion of these two provisions in the general banking laws of the State, as regulations to be observed by banks and their officers and directors would be sufficient, without providing that the violation of either provision should be a crime. The provision with reference to the reserve was enforcible by the Corporation Commission in the exercise of its power of supervision of banks. No provision was made for the enforcement of the prohibition of loans to individuals exceeding the statutory limitation. Violations of these and other provisions of the statute by directors might result in civil liability, only. Sec. 53, vol. III, 221(e).

However, at the Extra Session, held in December, 1921, the General Assembly amended the act ratified on 18 February, 1921, thereby providing as follows:

"Any offense against the banking laws of the State of North Carolina which is not elsewhere specifically declared to be a crime, or for which

elsewhere a penalty is not specifically provided, is hereby declared to be a misdemeanor, and shall be punishable at the discretion of the Court." Public Laws 1921, Extra Session, chap. 56, sec. 4, C. S., vol. III, 224(i).

The making of loans when the bank's reserve is below the statutory requirement, or in excess of the statutory limitation upon loans to individuals, is unlawful, and therefore an offense against the banking laws of the State by the express provisions of the act of 1921 (Words & Phrases, vol. 6, p. 4915). Such offense is not specifically declared in the act or elsewhere to be a crime; no specific penalty is provided in said act or elsewhere for the offense. Such offense is therefore included within the amendment, and by virtue of its express language, the making of loans in violation of section 29 and section 71, of chap. 4, Public Laws of 1921, is a misdemeanor, and is punishable at the discretion of the court, where such loans have been made since the ratification of the amendment on 19 December, 1921. Defendant's contention that the acts alleged in the indictments herein do not constitute crimes under the laws of this State cannot be sustained.

Defendant insists, however, very earnestly, that if this be conceded, violations of sections 29 and 71, of the act of 1921 are not crimes for which he, as an officer or director of the bank may be convicted and punished. He contends that at most only the bank is liable criminally for such violations of the statute. The language of the amendment is broad and inclusive. The construction which would limit criminal liability to the bank would defeat the manifest purpose of the General Assembly. The loans prohibited can be made for the bank only by officers and directors, and to hold that the bank only is liable criminally, would result, upon its conviction, in the imposition of a fine, the only punishment that can be imposed by the court upon a corporation, thus resulting in most instances in a further depletion of the already impaired resources of the bank, and entailing further loss to depositors and stockholders, for whose protection the provisions are primarily included in the statute. Guilt is personal, and the manifest purpose of the General Assembly in declaring the acts in violation of the statute misdemeanors, punishable at the discretion of the court, was to provide further assurance that these wise and prudent statutory provisions should be obeyed by those who alone could violate them, to wit, officers and directors of the bank. Their personal and individual liability for damages sustained by the bank, its stockholders or other persons, as a result of the violation of these and other provisions of the statute by directors or officers, was evidently not deemed sufficient for the purpose in the mind of the General Assembly. Sec. 53, C. S., vol. III, 221(e). The construction insisted upon by defendant which would limit liability, under the amend-

ment to the bank, cannot be sustained. In passing upon a similar contention, the Court of Appeals of New York, in *People v. Knapp,* 206 N. Y., 373, 99 N. E., 841, says: "A corporation, however, is a mere conception of the Legislative mind. It exists only on paper through the command of the Legislature that its mental conception shall be clothed with power. All its power resides in the directors. Inanimate and incapable of thought, action or neglect, it cannot hear or obey the voice of the Legislature, except through its directors. It can neither act nor omit to act except through them. Hence a command addressed to a corporation would be idle and vain unless the Legislature in directing the corporate body, acting wholly by its directors, to do a thing required or not to do a thing prohibited, meant that the directors should not make or cause the corporation to do what was forbidden or omit to do what was directed." See, also, 14 a C. J., 243, sec. 2073. "Neither in the civil nor the criminal law can an officer protect himself behind a corporation, when he is the actual, present and efficient actor." *U. S. v. Winslow,* 195 Fed., 578, (Affirmed, 227 U. S., 202, 57 L. Ed., 481).

It is an offense against the banking laws of the State of North Carolina for any bank, doing business under and pursuant to said laws, to make new loans or discounts, otherwise than by discounting or purchasing bills of exchange, payable at sight or on demand, or to make dividends of its profits, when the reserve as defined by statute is below the amount required by law, to wit, 15 per cent of the aggregate amount of its "demand deposits," and 5 per cent of the aggregate amount of its "time deposits"; such reserve consists of cash on hand and balances payable on demand, due from depositories designated by the board of directors and approved by the Corporation Commission.

It is also an offense against the banking laws of the State of North Carolina for any bank to make loans to any person, firm or corporation, whose total direct and indirect liabilities for money borrowed exceeds the maximum percentage of the capital stock and permanent surplus of the bank, as fixed by statute, subject to the provisions of said statute, defining what shall not be considered as money borrowed.

Each of the foregoing offenses is a misdemeanor, punishable at the discretion of the court; either the bank or its officers or directors or both may be convicted and punished for the commission of either offense. An intent to defraud the bank, or others is not required to be either alleged in the indictment or proved upon the trial of the issue raised by a plea of not guilty. Neither the bank nor any of its officers or directors have any discretion as to the making of loans which are thus forbidden. Intent is, therefore, not an element of the crime. The wilful doing of the unlawful act constitutes the crime declared by statute to be a misdemeanor, punishable as such in the discretion of the court.

We have examined with care the numerous exceptions of the defendant, taken to the admission or exclusion of evidence by the court. We do not deem it necessary to discuss *seriatim* the assignments of error based upon these exceptions. None of them can be sustained as prejudicial error. There was evidence tending to show that defendant was a director of the Liberty Savings Bank from its organization in January, 1919, until it was closed on 2 February, 1923. During all this time defendant was president of said bank. From March, 1921 to June, 1922, defendant was a resident of the city of Raleigh, engaged in the performance of his duties as vice-president of a bank in said city. He continued as active president of the Liberty Savings Bank—keeping in close touch with its business by correspondence and visits from time to time to Wilmington. By letters to the cashier of said bank, he directed loans to be made, and notes to be discounted. He signed statements filed with the Corporation Commission to the effect that he had, with other directors, examined all bills and notes forming a part of the assets of the bank. He certified as to the condition of said bank. Upon his return to Wilmington, he was on 23 June, 1922, made a member of the finance committee and served on said committee. By the by-laws of the corporation, the power was conferred upon the cashier, with the approval of the president, to make loans for the bank.

The capital stock of the Liberty Savings Bank was $25,000, and its permanent surplus $1,000; the limit of liability for a loan to any person, firm or corporation was therefore, $6,500. The total liabilities of the three persons named in the indictment, for money borrowed from said bank, from 19 December, 1921, to the date of the closing of said bank greatly exceeded this limitation. There is evidence that much of this liability was upon new loans made after 19 December, 1921.

There is abundant evidence that at the time loans were made, the reserve of the bank was below the statutory requirement. Defendant's contention to the contrary is based upon deposits appearing on the books of the banks which are manifestly the result of methods of bookkeeping and not actual deposits of money or its equivalent. These methods were adopted for the purpose of showing a balance due to the bank, which was not in fact payable upon demand, and therefore cannot be considered as constituting legal reserve.

Assignments of error based upon exceptions to the refusal of the court to give instructions as requested by defendant, and to instructions as given in the charge of the court cannot be sustained. His Honor's charge to the jury was exceptionally clear, full and comprehensive. There are 22 assignments of error, based upon 88 exceptions, which are grouped in defendant's brief, for the purpose of presenting his contention that

there was prejudicial error entitling him to a new trial. We cannot sustain these assignments of error. The judgments rendered upon the verdict, are within the discretion vested in the court by the statute. We find no error of law or legal inference and they must be affirmed. There is

No error.

VARSER, J., not sitting.

F. FOWLER v. E. FOWLER.

(Filed 25 November, 1925.)

1. **Courts—Judgments—Inherent Powers.**

At common law, the power to vacate judgments contrary to process of courts apparent upon the record, is inherent in the court rendering it.

2. **Judgments—Service—Summons—Procedure—Motions.**

A judgment procured contrary to the course and practice of the courts, is voidable, and when made to appear, the court rendering it may set it aside, on motion in the cause requiring reasonable promptness and ordinarily a show of merit.

3. **Same—Divorce—Publication of Service—Statutes—Affidavits.**

The requirements of our statute, C. S., 484, are mandatory, and must be followed in good faith in actions of divorce to obtain an order of publication of service of summons, and where the plaintiff in divorce fails to make affidavit that the defendant cannot after due diligence be found in the State, knowing that she was residing in another county therein, subject to personal service, and the summons has been returned endorsed that defendant cannot be found within the county of its issuance, etc., the judgment rendered therein by the Superior Court is void, and may be vacated by the court granting it within its inherent powers.

4. **Same—Death—Property Rights.**

Where the plaintiff in divorce has obtained a judgment void for irregularity in the service of summons, the same may be set aside on motion in the cause made after the defendant's death, when property rights are involved.

APPEAL by E. Fowler, movant, from order of *Lane, J.*, April Term, 1925. Reversed.

The court below rendered the following judgment:

"This cause coming on to be heard on motion of the defendant, in the cause heretofore tried in Mecklenburg County, entitled *'F. Fowler v. E. Fowler,'* for divorce, said motion being to set aside the judgment in that case rendered 5 November, 1924, in the Superior Court, alleging as ground for the motion that the order of publication of summons was procured from the clerk of the Superior Court of Mecklenburg

County by false and fraudulent affidavits, and for other causes as shown by the motion and petition filed therein, and the motion being heard upon affidavits filed:

"The court finds the facts to be that F. Fowler, the plaintiff in that action, and E. Fowler, were married on 18 May, 1921, for a time lived together as man and wife in Wake County, in the city of Raleigh; that subsequently the said F. Fowler separated himself from his wife, E. Fowler, and came to reside in the county of Union; and that while a resident of Union County he instituted an action for divorce in the Superior Court of Mecklenburg County; that summons by publication was made in a newspaper called the *Charlotte Herald*, published in the city of Charlotte, N. C., a weekly paper of very limited circulation; that the order of publication of summons was procured from the clerk of the Superior Court of Mecklenburg County upon the affidavit as set out in the record of that case; that no attempt was made to secure personal service as appears in the record; that at the time of publication of the notice of summons, the said E. Fowler was living in the county of Wake, in the city of Raleigh, and at the same house where she was living at the time that F. Fowler separated from her.

"The court further finds that the first knowledge which the defendant, E. Fowler, had of a pendency of any such suit or a judgment having been rendered therein, was in February, 1925, when she read in a newspaper an account of the killing of her husband in Union County, and a statement made in the paper that he had been recently divorced from her by a decree of the court in Mecklenburg County.

"The court further finds that the affidavit in which said F. Fowler swore that his wife was a nonresident of the State, and that she was keeping herself concealed within the State to avoid service of summons, was false.

"Upon these facts, the court being of the opinion that these matters and things constitute a fraud upon the defendant, E. Fowler, holds that the proper remedy in this case, if any she has, is by a separate action to set aside the judgment and not by a motion in the original cause.

"It is therefore ordered and adjudged that the motion is overruled."

The statement of case on appeal is as follows:

"Judgment of absolute divorce was rendered in an action entitled, 'F. Fowler, plaintiff v. E. Fowler, defendant,' in the Superior Court of Mecklenburg County on 6 November, 1924. This judgment granted an absolute divorce to the plaintiff, F. Fowler or Frank Fowler, against his wife, E. Fowler, or Etta Bagwell Fowler. There was no service of summons on the defendant who resided in Raleigh, N. C., and has been residing at Raleigh, N. C., ever since her marriage to the plaintiff in

1921. Service of summons was secured by publication. The plaintiff F. Fowler, was killed in February, 1925, by one Bertha Case, with whom he was living in adultery in Union County. Notices of the murder of Frank Fowler were published in the newspapers with the statement that he had secured a divorce from his wife, E. Fowler, or Etta Fowler. Upon seeing said notices, the defendant, E. Fowler, or Etta Fowler, made a motion in this cause to set aside the decree of divorce which had been entered in the Superior Court of Mecklenburg County. The motion to set aside the decree of divorce was based upon the lack of service, fraud, and other grounds set forth in the motion in this cause. The plaintiff, or respondent, executor of F. Fowler, filed a special appearance upon the ground that the court was without jurisdiction to pass upon and determine the alleged motion. Upon overruling the special appearance, the respondent filed an answer. Upon the motion and answer and affidavits on both sides the court found the facts as set forth in his judgment and held that a motion in the cause is not the proper remedy, but that the proper remedy is a separate action to set aside the judgment of divorce. From this judgment, the movant, Mrs. E. Fowler, or Mrs. Etta Fowler, appealed to the Supreme Court."

Other relevant facts will be set forth in the opinion.

The defendant's assignments of error are as follows: "That the court erred in holding that a motion in the cause was not the proper remedy in this case, for that a motion in the cause is always the proper remedy. (1) When there is no service of process; (2) Where the affidavit for publication of summons is false and defective; (3) Where there is fraud upon the court in securing judgment; (4) For excusable neglect under C. S., 600."

S. W. Eason and Walter Clark for E. Fowler, defendant, movant.

W. B. Love and Vann & Milliken for Clifford Fowler, executor of estate of F. Fowler (F. J. or Frank Fowler), deceased.

CLARKSON, J. The power to vacate judgments was conceded by the common law to all its courts. Within its proper limitations it is a power inherent in all courts of record and independent of statute. It may be exercised by the court either of its own motion or suggestion by a party or interested person. At common law this power was exercised in a great variety of circumstances and subject to various restraints. 1 Freeman on Judgments, 5 ed., part sec. 194.

There is a vast difference between void and voidable judgments. It is a universally accepted rule that a judgment which is absolutely void may be vacated by the court in which it is tendered. It is at all times a nullity. A court may strike from its record what purports to be but

is not in fact a judgment, because entered without authority. *Clark v. Homes,* 189 N. C., 708. A judgment void upon its face is subject to both direct and collateral attack. A judgment may be vacated for prejudicial irregularity, and is a voidable judgment. It is good and valid until set aside. The power to vacate judgments on this ground is not dependent on statute, but is inherent in the court. In order to such relief in case of judgments voidable for irregularity, reasonable promptness and ordinarily a show of merit is necessary. *Gough v. Bell,* 180 N. C., 268; *Cox v. Boyden,* 167 N. C., 320; *Becton v. Dunn,* 137 N. C., 559.

An irregular judgment can be set aside by direct attack—motion in the cause by a party thereto—within any reasonable time and ordinarily showing merit. *Carter v. Rountree,* 109 N. C., 29; *Everett v. Reynolds,* 114 N. C., 366; *Jeffries v. Aaron,* 120 N. C., 167; *Clement v. Ireland,* 129 N. C., 221; *Ins. Co. v. Scott,* 136 N. C., 157; *Duffer v. Brunson,* 188 N. C., 789; *Ellis v. Ellis, ante,* 418.

"A judgment is said to be irregular whenever it is not entered in accordance with the practice and course of proceeding where it is rendered. The irregularities which have been treated as sufficient to justify the vacations of judgments are very numerous, and it is not possible to prescribe any test by which, in all jurisdictions, to determine whether or not a particular irregularity is such as to require the vacation of a judgment. When the irregularity does not go to the jurisdiction of the court, its action will be largely controlled by the promptness with which the application is made, and by the consideration whether or not the irregularity is one which could have operated to the prejudice of the applicant." 1 Freeman on Judgments, 5 ed., part sec. 218. *Williamson v. Hartman,* 92 N. C., 236; *Stancill v. Gay,* 92 N. C., 455; *Scott v. Life Association,* 137 N. C., 515; *Glisson v. Glisson,* 153 N. C., 185; *Currie v. Mining Co.,* 157 N. C., 209.

"Many decisions emphasize as a feature of collateral attack its attempt to step outside the record of the former judgment; the rule of such decisions is that any effort to impeach a judgment in a prior action or proceeding is collateral when it is based on allegations of facts not apparent on the face of the record, but wholly dehors the record." 1 Freeman, *supra,* part sec. 306.

In a California case it was said: "When we speak of a direct attack upon the judgment, we usually refer to some proceeding in the action in which it was rendered, either by a motion before the court which rendered it, or an appeal therefrom, whereas an attempt to impeach the judgment by matters dehors the record is a collateral attack." *Parson v. Weis,* 144 Cal., 410, 77 Pac., 1007.

An attack upon a judgment can be either by motion in the cause or separate independent action. The court below held "that the proper

remedy in this case, if any she has, is by a separate action to set aside the judgment and not by a motion in the original cause."

In the statement of case on appeal "the motion to set aside the decree of divorce was based upon the lack of service, fraud, and the other grounds set forth in the motion in this cause," etc.

One of the assignments of error "When there is no service of process." From the record the affidavit for publication of summons is as follows: "F. Fowler, plaintiff in the above entitled action, being duly sworn, says, that the above named defendant is a nonresident; that if she is a resident of the State, she keeps herself concealed so summons cannot be served on her; that the plaintiff has a good cause of action against the defendant; that this is an action started by the plaintiff against the defendant to obtain an absolute divorce, and to have the bonds of matrimony heretofore existing between the parties dissolved; that summons in this action was duly issued and the sheriff of Mecklenburg County, has returned said summons, endorsed thereon 'the defendant, after due diligence cannot be found in Mecklenburg County, and after due and diligent search, defendant cannot be found in the State of North Carolina.'"

C. S., 484, is as follows: "Where a person on whom the service of the summons is to be made cannot, after due diligence, be found in the State, and that fact appears by affidavit to the satisfaction of the court, or a judge thereof and it in like manner appears that a cause of action exists against the defendant in respect to whom service is to be made, or that he is a proper party to an action relating to real property in this State, such court or judge may grant an order that the service be made by publication of a notice in either of the following cases: . . . (5) Where the action is for divorce," etc.

The affidavit of F. Fowler does not follow the plain language of the statute to obtain service by publication and nowhere does he make oath that the defendant E. Fowler "cannot after due diligence be found in the State." This is mandatory. If, as the record discloses in this case, the defendant at the time was in the State without this oath plaintiff could not be indicted for perjury. The affidavit embodying this material allegation is the very cornerstone to obtain jurisdiction by publication. This all-important material allegation was omitted from the affidavit contrary to the very wording of the statute.

In *Davis v. Davis,* 179 N. C., 188, this question is discussed and the Court said: "The service of summons by publication is fatally defective, in that it does not conform to the requirements of the statute. The foundation and first step of service by publication is an affidavit that 'the person on whom the summons is to be served cannot, after due diligence, be found within the State.' . . . Everything necessary to

dispense with personal service of the summons must appear by affidavit. The mere issuing of summons to the sheriff of the county of Pasquotank, and his endorsement upon it the same day after it came to hand, that the 'defendant is not to be found in my county,' is no compliance with the law; for it might well be that the defendant was at that time in some other county in the State, and that the sheriff knew it, or by due diligence, could have known it, and make upon the defendant a personal service of the summons. Every principle of law requires that this personal service should be made, if compatible with reasonable diligence." *Sawyer v. Drainage District,* 179 N. C., p. 182.

It is well-settled that for fraud perpetrated on a party to the action the judgment must be attacked by an independent action. *Bost v. Lassiter,* 105 N. C., 490; *Sharp v. R. R.,* 106 N. C., 308; *Smallwood v. Trenwith,* 110 N. C., 91; *Uzzle v. Vinson,* 111 N. C., 138; *Gallop v. Allen,* 113 N. C., 25; *Simmons v. Box Co.,* 148 N. C., 344; *Craddock v. Brinkley,* 177 N. C., 125.

Clark, C. J., in *Simmons v. Box Co., supra,* at p. 345, said: "In the well-known case of *Harrison v. Harrison,* 106 N. C., 282, it was held that when there was no service of process the judgment could be set aside by motion in the cause. 'Where it appears from the record that a person was a party to an action, when in fact he was not, the legal presumption that he was a party is conclusive until removed by a *correction of the record itself,* by a direct proceeding for the purpose.' *Sumner v. Sessoms,* 94 N. C., 377. This means by motion in the cause, for the court corrects the record to speak the truth. To same purport, *Doyle v. Brown,* 72 N. C., 393, where it is said: 'Where the summons was not served on defendant and he did not enter an appearance nor have any knowledge of the action until after default judgment, the judgment is void and will be set aside, *on motion.*'" *Long v. Rockingham,* 187 N. C., p. 209.

In *Craddock v. Brinkley, supra,* p. 127, it is said: "It is true that when the ground alleged for setting aside the judgment is not based upon fraud, the proper remedy is by motion in the cause, but we have no distinct forms of action now, and it has been held that when a party by mistake brings an independent action when his remedy is by motion in the original cause, the court may, in its discretion, treat the summons and complaint as a motion. *Jarman v. Saunders,* 64 N. C., 367. It is true that an independent action, when brought in another county, cannot be treated as a motion in the cause (*Rosenthal v. Roberson,* 114 N. C., 594), but that does not obtain here as the proceeding is in the same county."

In the case at bar defendant, movant, relies on several motions. We think a motion in the cause the proper procedure, as there was no service of process and the attempted service a nullity and the judgment void.

Defendant, movant, contends that property rights are involved in this case and a decree of divorce may be set aside after the death of one of the parties.

Executor of plaintiff contends that: *"Webber v. Webber,* 83 N. C., 280, is cited by the appellant defendant, movant," and says: "There the plaintiff died during the term. Issues were found in his favor. The opinion in that case opens with the statement by *Smith, C. J.:* 'It is clear that the action does not survive, and consequently abates, unless prevented by the rule of relation, whereby all judicial proceedings during a term are treated as if they took place on the first day of the term.' " But in the conclusion of the opinion, this is said (p. 284): "It is suggested that the action for a dissolution of the marriage tie, the end and solution of which are consummated by death, rendering a judgment needless, does not fall under the control of a fiction adopted for other and different purposes. While the suggestion is not without force, we can find no legal ground for its exemption from the operation of a principle applicable to all other actions."

We think the great weight of authority sustains the position that the decree can be vacated under the facts and circumstances in this case.

19 C. J., 169, sec. 421, on Divorce, states: "Yet by the weight of authority, for the purpose of establishing property rights the court may vacate a decree, even after complainant's death, where it was obtained by fraud, and imposition on the part of the complainant, *or without due service of process.*" (Italics ours.)

This case discloses a flagrant abuse of the process of the court. The plaintiff, now deceased, knowing that his wife was alive and in the State, starts a divorce proceeding in a distant county in the State, different from the one he lived in. He makes no affidavit, as is required by the statute where the parties are nonresident to get jurisdiction in this State, that the wife, the defendant, "cannot, after due diligence, be found in the State." He omits from his oath this material allegation, and obtains an order to give notice by publication. This is published in a paper of small and limited circulation. Only the initials of him and his wife are set forth in the action. He makes serious charges against his wife, as taking place in South Carolina—beyond this jurisdiction, and obtains a decree of divorce without any knowledge on her part to defend her character. The only knowledge that came to her was when he was killed by his paramour and the article in the newspaper set forth this divorce unknown before to her. If, under the facts and circumstances here disclosed, the courts could not protect this wife, justice would be dead.

The judgment below is

Reversed.

DAVIS BROTHERS COMPANY v. JOHN C. WALLACE AND THE U. S. FIDELITY AND GUARANTY COMPANY.

(Filed 25 November, 1925.)

1. Appeal and Error—Objections and Exceptions—Remand.

Where on appeal from an inferior court some of the appellant's exceptions have been sustained in the Superior Court, and also in the Supreme Court, resulting in a remand of the case to the initial court, the appellant may not successfully complain that all of his exceptions on his first appeal had not been passed upon.

2. Actions—Claim and Delivery—Nonsuit—Independent Actions—Damages.

Where the plaintiff has taken a voluntary nonsuit after the property had been taken in claim and delivery and therein sold, the defendant in that action may maintain an independent action for damages, against the plaintiff in the former action and the surety on his bond, given in conformity with C. S., 833, wherein nominal damages at least are recoverable, with actual damages for the value of the property at the time of the seizure under claim and delivery.

3. Same—Contracts—Breach—Principal and Surety—Bonds—Statutes.

Where the plaintiff after claim and delivery and sale therein of the property, has taken a voluntary nonsuit, in an independent action by the defendant against the principal therein and the surety on his bond, the question of the defendant's ownership is material only on the issue as to the measure of damages, the burden of proof being on the plaintiff in the second action, C. S., 580.

4. Same—Burden of Proof.

Where the plaintiff in claim and delivery has taken a voluntary nonsuit after selling the property, the fact that the property was taken from the defendant's possession is evidence of his ownership, and in an independent action to recover damages against the plaintiff in the former action and the surety on the claim and delivery bond, the defendant in the former action was entitled to recover, nothing else appearing, the value of the property when taken, with interest, as damages for retention, and where the defendant alleges ownership, the burden is on him to prove it.

5. Same—Contracts—Breach.

The failure of plaintiff to restore the property to defendant in claim and delivery, and to prosecute his action to final success, is a failure to perform the conditions that our statute requires for the delivery of the property to him, and where he has taken a voluntary nonsuit in his action without performing these conditions, the defendant, in an independent action against the principal and surety on his bond, may have the matters determined.

APPEAL from judgment of Superior Court of FORSYTH, March Term, 1925. *Schenck, J.* Affirmed.

This action was instituted in Forsyth County Court, on 16 July, 1924, to recover damages for breach of a bond, executed by John C. Wallace, as principal, and the U. S. Fidelity and Guaranty Company, as surety. Said bond, conditioned as required by C. S., 833, was filed by said John C. Wallace in an action commenced by him in said court on 27 May, 1921, to procure the issuance and service of a writ of claim and delivery, in said action, for an automobile in possession of Davis Brothers Company. Pursuant to said writ, the sheriff of Forsyth County took said automobile from the possession of said Davis Brothers Company, and delivered same into the possession of John C. Wallace. Thereafter, said John C. Wallace, by virtue of a power of sale contained in a chattel mortgage executed by Leo W. Morton, sold said automobile, at public auction, and filed a report of said sale in said action. On 23 November, 1923, without notice to or consent of Davis Brothers Company, defendants in said action, said John C. Wallace, plaintiff therein, took a voluntary nonsuit. Plaintiffs in this action allege that the failure of John C. Wallace to prosecute the action in which said bond was filed, was a breach of said bond, for which plaintiffs are entitled to recover damages.

Plaintiffs further allege that they were, at the time said automobile was seized by the sheriff, under the writ of claim and delivery, and are now the owners and entitled to the possession of said automobile; that notwithstanding the action, in which said bond was filed, has terminated by a judgment upon a voluntary nonsuit, John C. Wallace, principal in said bond, has failed and refused to return said automobile to plaintiff's obligee in said bond, but has disposed of the same; that such failure and refusal by John C. Wallace to return said automobile to plaintiffs was a breach of said bond for which plaintiffs are entitled to recover damages.

Plaintiffs allege that the fair market value of said automobile, at time same was seized by the sheriff, was $1,100; they demand judgment that they recover of defendants said sum and interest from date of seizure as damages for the breach of said bond.

Defendants deny that there has been any breach of said bond; deny that plaintiffs were or are the owners and entitled to possession of said automobile; they allege, as a further defense, that plaintiffs are estopped to allege or claim that they are the owners of said automobile (1) by their failure to answer the verified complaint filed on 11 June, 1921, by John C. Wallace in the action in which the bond was filed; (2) by their failure to object to the sale of the automobile by John C. Wallace, on 16 July, 1921, after advertisment, under the power of sale contained in the chattel mortgage executed by Leo W. Morton to John C. Wallace, or to file exceptions to the report of said sale made to the court in said action on 18 July, 1921; and (3) by their acceptance of a check on

27 May, 1921, given them by John C. Wallace in payment of certain repairs to said automobile made by plaintiffs after notice of the claim of John C. Wallace to the automobile by virtue of the chattel mortgage executed to him by Leo W. Morton on 21 March, 1921, and duly recorded on said date.

The issues submitted to the jury, with answers thereto, were as follows:

1. Were the plaintiffs the owners and entitled to the possession of the automobile described in the complaint at the time it was seized by claim and delivery in the case of John C. Wallace v. Davis Brothers Company and Leo W. Morton? Answer: No.

2. Is the plaintiff's action barred by the statute of limitations? Answer: No.

3. What amount of damages, if any, are the plaintiffs entitled to recover of the defendants? Answer: . . .

From judgment rendered upon this verdict, plaintiffs appealed to the Superior Court of Forsyth County, assigning as errors:

First: The refusal of the court to submit issues tendered by plaintiff as follows:

1. Did defendants execute the bond as alleged in the complaint?

2. Was there a breach of the bond as alleged in the complaint?

3. What damages, if any, are the plaintiffs entitled to recover?

Second: The refusal of the court to instruct the jury, as requested by plaintiffs, that "the defendants are liable in this action upon the bond for the value of the car at the time of seizure on 30 May, 1921, with interest from that date until paid, unless the defendant, Wallace, had title to the car by virtue of his alleged chattel mortgage. The plaintiffs in this action being in possession at the time of the seizure in 1921, were presumptively the owners of the car and are entitled to recover its value, unless the defendant can establish that Wallace was the owner or had special property in it for which he was entitled to possession."

Third: The refusal of the court to instruct the jury as requested, that "all allegations and proof of title in the car in the defendant Wallace in this car are material only in mitigation of damages. Upon the issue of damages, the burden of proof is upon the defendants to establish by the greater weight of the evidence that Morton had title to the car at the time Wallace took the alleged chattel mortgage. If defendants do not so satisfy you by the greater weight of the evidence, the plaintiffs are entitled to recover the value of the car at the time of seizure, 30 May, 1921, with interest from said date."

Plaintiffs also assigned as error, the submission of the issues appearing in the record, the refusal of the court to give other instructions as requested by the plaintiffs, and certain instructions given as appear in the case on appeal.

At the hearing of the appeal, at March Term, 1925, of the Superior Court of Forsyth County, Judge Schenck sustained the assignments of error, hereinbefore stated, and remanded the cause to the Forsyth County Court for a new trial. He did not consider or pass upon other assignments of error. From his judgment and order, both plaintiffs and defendants appealed to the Supreme Court.

Ratcliff, Hudson & Ferrell for plaintiffs.
Raymond G. Parker and Richmond & Rucker for defendants.

CONNOR, J. This action is here upon appeal from the judgment of the Superior Court of Forsyth County, remanding the action to the Forsyth County Court for a new trial. It was heard in the Superior Court upon appeal by plaintiffs from the judgment of the county court. The judge of the Superior Court, exercising the appellate jurisdiction conferred upon that court by statute (see *Chemical Co. v. Turner, ante,* 471), in deference to the suggestion made in the opinion by *Stacy, C. J.,* in *Smith v. Winston-Salem,* 189 N. C., 178, in his judgment has stated separately his rulings upon plaintiff's assignments of error, which resulted in the order for a new trial. He did not consider the remaining assignments of error appearing in the case on appeal. Having sustained the assignments of error considered by him, as stated in the judgment, and thereupon ordered a new trial, he did not deem it necessary to consider or pass upon the remaining assignments. Plaintiffs do not and cannot complain of this. They were successful upon their appeal from the county court, and in this Court ask that the judgment of the Superior Court be affirmed. This Court cannot consider or pass upon assignments of error made by plaintiffs in their appeal from the county court, which the Superior Court did not consider—it is limited to the consideration of assignments of error upon the trial in the county court sustained by the Superior Court and presented to this Court by exceptions duly taken by defendants, appellants, who ask that the judgment of the Superior Court be reversed for errors assigned.

Defendants first assign as error the ruling of the judge of the Superior Court sustaining plaintiff's exceptions to the refusal of the trial court to submit the issues tendered by plaintiff, and to the issues as submitted. This assignment of error cannot be sustained. The refusal of the trial court to submit the issues tendered was error, as held by the judge of the Superior Court. This is an action to recover damages for breach of a bond. The issues raised by the pleadings and determinative of plaintiff's right to recover involve the execution of the bond, its breach and the damages sustained. The ownership and right of possession of the automobile are not in issue upon the pleadings, in the sense that such ownership and right of possession are material to the cause of action

alleged in the complaint. It is true that the ownership of the automobile by plaintiffs at time of its seizure by the sheriff, under the writ of claim and delivery, issued upon the filing of the bond sued upon in this action, is a question of fact material to the determination of the amount of damages which plaintiffs may have sustained by a breach of the bond, as alleged in the complaint. Such ownership, however, is not determinative of the right of plaintiffs to recover in this action.

If the bond was executed by defendants and there was a breach thereof as alleged in the complaint, plaintiffs, although not the owners or entitled to the possession of the automobile at the time of its seizure, are entitled to recover at least nominal damages. 34 Cyc., 1585. *Alderman v. Roesel*, (S. C.), 29 S. E., 385; *Little v. Bliss*, (Kan.), 39 Pac., 1025; *Smith v. Whiting*, 100 Mass., 122.

If there was a breach of the bond as alleged in the complaint, such breach was a wrongful act, and the law infers or presumes damages arising therefrom to plaintiffs; if no actual or substantial damages are shown, the law gives nominal damages in order to determine and establish plaintiff's right of action and thus affords a remedy for the wrong done to them by the defendants' breach of the bond; *Bond v. Hilton*, 47 N. C., 149; *Creech v. Creech*, 98 N. C., 156; *Brunhild v. Potter*, 107 N. C., 416; *Hutton v. Cook*, 173 N. C., 496; *Cooper v. Clute*, 174 N. C., 366. The allegations in the pleadings as to the ownership of the automobile are not material to plaintiff's right to recover; the first issue submitted to the jury was not determinative of the cause of action set out in the complaint; it was therefore error to submit said issue over the objection of plaintiffs, and the judge of the Superior Court properly sustained the assignment of error based upon the exception thereto. C. S., 580 and cases cited. *Bank v. Broom Co.*, 188 N. C., 508.

Defendants further assign as error the ruling of the judge of the Superior Court sustaining plaintiffs' exception to the refusal of the trial court to give the instructions requested. See statement of case above. This assignment of error cannot be sustained. The ruling upon plaintiff's exceptions was correct. The instructions requested should have been given upon the issue as to damages. If the plaintiffs were the owners and entitled to the possession of the automobile at the time it was taken from their possession by the sheriff, under the writ of claim and delivery, then upon a breach of the bond as alleged in the complaint, plaintiffs were entitled to recover of defendants the value of said automobile at the time of the seizure, as damages, if the same cannot now be returned by defendants. 34 Cyc., 1582 and cases cited. *Piffley v. Kendrick* (Ind.), 31 N. E., 40; *Little v. Bliss* (Kan.), 39 Pac., 1025; *Siebolt v. Konatz Saddlery Co.* (N. Dak.), 106 N. W., 564, 23 R. C. L., p. 916, sec. 81.

Upon the issue as to damages, if plaintiffs would recover more than nominal damages for the breach of the bond, as alleged, the burden is upon them to offer evidence from which such damages may be assessed; the fact that the automobile was taken from their possession is evidence of ownership by them; upon the judgment, dismissing the action, upon voluntary nonsuit, plaintiffs were entitled to an order of restitution; such order was not made, and defendant, John C. Wallace, has failed to return the automobile; nothing else appearing plaintiffs are entitled to recover of said defendant and the surety on his bond, the value of said automobile when taken from their possession, with interest as damages for detention. As an affirmative defense, defendants allege that at the time of the taking, John C. Wallace was the owner of said automobile, by virtue of a chattel mortgage executed to him by Leo W. Martin. The burden is upon him to establish his ownership under said mortgage as alleged by the greater weight of the evidence. *Speas v. Bank,* 188 N. C., 524. The damages in this action must be assessed upon the same principles and under the same rules as would have applied, if the damages had been assessed in the action in which the writ of claim and delivery was issued. 23 R. C. L., p. 916, sec. 81; *Washington Ice Co. v. Webster,* 62 Me., 341, 16 Am. Rep., 462; *Lapp v. Ritter,* 88 Fed., 108. The question of ownership is material only in mitigation of damages, and not having been adjudicated in the former action, may in this action be considered by the jury in determining the amount of damages sustained by plaintiffs by breach of the bond. Plaintiffs are entitled to recover as actual damages only such sum as the jury may assess as compensation for loss sustained by breach of bond.

The action commenced by John C. Wallace to recover of Davis Brothers Company the automobile in their possession, upon his allegation of ownership, having been dismissed upon his voluntary nonsuit, without an adjudication as to ownership, and without an order of restitution, Davis Brothers Company may maintain an independent action to recover of the principal, and his surety, damages for the breach of the bond. *Martin v. Rexford,* 170 N. C., 540; *Mahoney v. Tyler,* 136 N. C., 41; *Mfg. Co. v. Rhodes,* 152 N. C., 637; *Manix v. Howard,* 82 N. C., 125. Failure to prosecute the action in which the property was taken from plaintiffs, under writ of claim and delivery, is a breach of the bond, entitling plaintiffs, to at least nominal damages. Failure to return the property to plaintiffs after judgment dismissing the action upon voluntary nonsuit, is a breach of the bond, and upon it appearing that the property cannot be returned, plaintiffs are entitled to recover of the principal and surety on the bond as actual damages, the value of the property, at the time of its seizure. Defendants, however, allege as an affirmative defense to the recovery of actual damages that the plaintiffs were not at the time

of its seizure, and are not now owners of the automobile, but that defendant, John C. Wallace, was the owner by virtue of a chattel mortgage executed by a third person. The dismissal of the action, upon voluntary nonsuit was not conclusive as to the title to the automobile, and defendants may in this action offer evidence in support of their allegation, not to defeat plaintiffs' action, but in mitigation of actual damages which they may recover. *Gilbert v. American Surety Co.*, 121 Fed., 499, 61 L. R. A., 253. The burden of establishing the truth of this allegation by the greater weight of the evidence, is upon defendants. Where, however, there has been an adjudication that the obligee in the bond, is the owner of the property, in a judgment by default and inquiry, such adjudication is conclusive, and neither the principal nor the surety may further controvert such ownership. *Garner v. Quakenbush*, 188 N. C., 180.

Many interesting questions are discussed in the briefs filed in this Court. They are not, however, presented upon this appeal. Defendants' assignments of error cannot be sustained, and the judgment remanding the action to Forsyth County Court for new trial is

Affirmed.

J. W. McCAIN v. HARTFORD LIVE STOCK INSURANCE COMPANY.

(Filed 25 November, 1925.)

1. Insurance—Contracts—Policies—Application.

The statements, agreements and warranties in an application for insurance, are to be construed as a part of the policy thereafter issued, when it is so stated therein.

2. Same—Live Stock—Health—Policy Stipulations.

Construing a provision in a livestock policy of insurance that the animal must be in good health and entirely free from sickness or injury, and not to be considered as in force until countersigned by the general agent of insurer: *Held*, a policy not so countersigned or delivered until after the death of the insured animal was unenforcible.

3. Contracts—Agreement—Insurance—Policies.

Where the general agent of the insurer rightfully declines to recognize the validity of a livestock policy of insurance, countersigned and delivered after the death of the animal insured, and returns the premium paid by the insured to him, the policy sued on is invalid upon the ground that the minds of the parties had not agreed or come together so as to make a binding contract.

4. Same—Interpretation.

Where the written contract is clearly expressed without ambiguity, its language will control, leaving nothing for interpretation under the rules otherwise applicable in case of ambiguity.

5. Same.

A written contract is the expression of the agreement of the minds of the parties, and not what either party erroneously thought it was.

6. Same—Ambiguity.

In case of ambiguity in the words of a written contract, reasonable doubts are resolved against the one who has prepared it.

Appeal by plaintiff from Union Superior Court. *Bryson, J.*

From a judgment of nonsuit plaintiff appeals. Affirmed.

This action was instituted in the court of a justice of the peace to recover $100 on account of the death of a mule alleged to have been insured by defendant. The defendant entered a general denial.

The evidence for plaintiff tended to show that plaintiff received by mail a policy of insurance. This policy describes one mare mule named "Kit," 3 years old, used for farming, valued at $100.

The policy states that "it does hereby insure J. W. McCain, of Waxhaw, North Carolina, from 28 July, 1924, at noon" and it is recited also that this is done "in consideration of the statements, agreements, and warranties contained in the application, or applications, upon which this policy is based, and which are hereby referred to and made a part of this contract."

That the mule was on plaintiff's farm near Waxhaw, in the charge of Azariah Clifton, plaintiff's tenant. The mule died during the morning of 29 July; that plaintiff had not then received the policy, but that it reached him by mail on the morning of 31 July; that plaintiff immediately sent check for premium, giving notice of the death of the mule; that plaintiff was local agent of defendant, and that defendant had a State agent at High Point. The letter returning plaintiff's check says: "In view of the fact that this policy was written in this office on 28 July, it could not have possibly been delivered by the time this mule died. You are advised that the company can admit of no liability whatsoever. We will consider that no insurance has been in effect at all and the entire premium will be returned," with a request for return of the policy.

Plaintiff refused to return the policy, advising that he considered his claim legal and would contend for it. Plaintiff's checks covering premium on this policy were all returned to him. There was no "binder" given; no agent had the right to write a "binder." Plaintiff admitted that his application contained the following: "It is agreed that this insurance

shall not be in force or effect until and unless this application shall be accepted and favorably passed upon by the above-named insurance company, policy of insurance issued by said company and the premium paid thereon, and policy delivered to me while the animal or animals covered by said policy is in good health and entirely free from sickness or injury."

The application for policy was received by defendant 26 July, 1924. The policy provides that it shall "not be binding until countersigned by the general agent or other duly authorized representative of the company at High Point, North Carolina." It was countersigned by Mendenhall, agent at High Point, N. C., on 30 July, 1924.

H. B. Adams for plaintiff.
Myers & Snerly and John C. Sikes for defendant.

Varser, J. The defendant submits several contentions that the judgment of nonsuit is correct. We need only consider one of these, to wit, the provision in the contract that the policy does not cover animals not in good health and entirely free from sickness or injury when the policy is delivered to plaintiff. The policy makes the application, and its provisions are a part of the policy itself. It is, therefore, just as much a part thereof as if written in the policy. *Bobbitt v. Ins. Co.*, 66 N. C., 70; *Ormond v. Ins. Co.*, 96 N. C., 158; *Cuthbertson v. Ins. Co.*, 96 N. C., 480, 486; *Fuller v. Knights of Pythias*, 129 N. C., 319; *Heilig v. Ins. Co.*, 162 N. C., 521; *Schas v. Ins. Co.*, 166 N. C., 55, 62; *Sheldon v. Ins. Co.*, 22 Conn., 235; *Lee v. Ins. Co.*, 203 Mass., 299; *Duncan v. Ins. Co.*, 6 Wend. (N. Y.), 488.

The delivery of the policy is admitted by plaintiff to have been 31 July, 1924, "in the morning mail." The mule had been dead two days.

The plaintiff is a sub-agent of the defendant. It is a fair inference from his evidence that he is a man of intelligence, active and prompt in business, and fully capable of understanding all provisions of the application and policy of insurance. The contract is what the parties agreed, and not what either party thought. *Brunhild v. Freeman*, 77 N. C., 128; *Building Co. v. Greensboro, ante*, 501.

Rules of construction are only aids in interpreting contracts that are either ambiguous or not clearly plain in meaning, either from the terms of the contract itself, or from the facts to which it is to be applied. When such a situation is presented the terms of the contract are construed against him who prepared it, the insurer, and in favor of the insured. *Kendrick v. Ins. Co.*, 124, N. C., 315, 320; *Bank v. Ins. Co.*, 95 U. S., 673; *Grabbs v. Ins. Assn.*, 125 N. C., 389; *Bank v. Fidelity Co.*, 128 N. C., 366; *Rayburn v. Casualty Co.*, 138 N. C., 379; *Bray v. Ins.*

Co., 139 N. C., 390; *Jones v. Casualty Co.*, 140 N. C., 262; *R. R. v. Casualty Co.*, 145 N. C., 114; *Arnold v. Ins. Co.*, 152 N. C., 232; *Higson v. Ins. Co.*, 152 N. C., 206; *Powell v. Ins. Co.*, 153 N. C., 124; *Penn. Ins. Co.*, 160 N. C., 399. This applies also to standard policies. *Gazzam v. Ins. Co.*, 155 N. C., 330; *Collins v. Casualty Co.*, 172 N. C., 543; *Lyons v. Knights of Pythias*, 172 N. C., 408; *Moore v. Accident Assurance Corp.*, 173 N. C., 532; *Trust Co. v. Ins. Co.*, 173 N. C., 558; *Smith v. Fire Ins. Co.*, 175 N. C., 314; *Guarantee Corporation v. Electric Co.*, 179 N. C. 402.

An insurance policy is only a contract, and is interpreted by the rules of interpretation applicable to other written contracts, and the intention of the parties is the object to be attained. *Crowell v. Ins. Co.*, 169 N. C., 35.

When clearly and unambiguously expressed it does not require construction and its words will be taken in the plain and ordinary sense. *Crowell v. Ins. Co., supra; Bray v. Ins. Co., supra; R. R. v. Casualty Co., supra; Durand v. Ins. Co.*, 63 Vt., 437; Vance on Insurance, 593; *Power Co. v. Casualty Co.*, 188 N. C., 597, 600.

The provision in the policy that the insurance shall not be in force or take effect unless the policy is delivered to the plaintiff while the animal covered by the policy is in good health and entirely free from sickness or injury, is not in conflict with the other provisions of the policy. That the animal described in the policy shall be in good health at the time of its delivery, is a condition precedent to the right of the plaintiff to recover. *Whitley v. Ins. Co.*, 71 N. C., 480; *Ormond v. Ins. Co.*, 96 N. C., 158; *Ross v. Ins. Co.*, 124 N. C., 395; *Ray v. Ins. Co.*, 126 N. C., 166; *Perry v. Ins. Co.*, 150 N. C., 143.

It is admitted in the instant case that the mule described in the policy died before the policy was countersigned at High Point, by the agent Mendenhall, and two days before the policy was sent through the mail to the plaintiff, defendant's sub-agent at Waxhaw, N. C. As soon as defendant's agent at High Point was informed by plaintiff that the mule had died on 29 July, the check sent for the premium was returned and a return of the policy was requested. It is clear that the minds of the parties never met upon a contract of insurance on the life of the mule in controversy. *R. R. v. Casualty Co., supra; Power Co. v. Casualty Co., supra; Paine v. Pacific Mut. Life Ins. Co.*, 51 Fed., 689; *Misselhorn v. Mut. Reserve Fund Life Assn.*, 30 Fed., 545; *Reserve Loan Life Ins. Co. v. Hockett*, 73 N. E., 842; *Piedmont and Arlington Life Ins. Co. v. Ewing*, 92 U. S., 377; *McClave v. Mut. Reserve Life Assn.*, 26 At., 78; *Smith v. Commonwealth Life Ins. Co.*, 162 S. W., 779; *Dumas v. North-*

western National Ins. Co., 40 L. R. A., 358; *National Life Ins. Co. v. Jackson*, 161 Ark., 597; *Life & Casualty Ins. Co. v. King*, 137 Tenn., 685.

In *Fox v. Ins. Co.*, 185 N. C., 121, this Court allowed the case to be submitted to the jury because it was not an action on the policy which had not been delivered, but an action in tort for a negligent failure to deliver the policy. Plaintiff's cause of action was bottomed on his loss by the defendant's negligence in not delivering the policy and thereby making an insurance contract.

Ins. Co. v. Grady, 185 N. C., 348, is not in conflict with the views herein expressed. This case involves the delivery of a policy when the facts were known to the insurer and the subject of insurance still existed. In the instant case the subject-matter of the insurance, to wit, the mule, did not, at the time of the delivery, exist.

Parties would not knowingly make an insurance contract regarding a mule not in existence. The thing contemplated to exist and whose existence was an indispensable basis for their contemplated agreement, had no existence; therefore, there was no contract. *Eliason v. Henshaw*, 4 Wheat., 227; *Carr v. Duval*, 14 Pet., 77, 81; *Misselhorn v. Mut. Reserve Fund Life Assn., supra; Paine v. Pac. Mut. Life Ins. Co., supra; Reserve Loan Life Ins. Co. v. Hockett, supra; Piedmont and Arlington Life Ins. Co. v. Ewing, supra; McClave v. Mut. Reserve Fund Assn., supra; Bowen v. Prudential Ins. Co.*, 144 N. W., 543; *Hartsock v. Live-stock Ins. Co.*, 223, Ill. App., 433; *Dumas v. Northwestern National Ins. Co., supra; National Life Ins. Co. of U. S. v. Jackson*, 161 Ark., 597; *Life & Cas. Co. v. King*, 137 Tenn., 685; *Ridinger v. Am. Live Stock Ins. Co.*, 201 N. W., 157; *Hartford Live Stock Ins. Co. v. Henning*, 266 S. W., 912; *Johnston v. Northwestern Live Stock Ins. Co.*, 107 Wis., 337; *Alston v. Ins. Co.*, 7 Kansas App., 179; *Green Bros. v. N. W. Live-stock Ins. Co.*, 87 Iowa 358; *Live Stock Ins. Co. v. Bartlow*, 60 Ind. App., 233; *Hensel v. Live Stock Ins. Co.*, 219 Ill. App., 77; *Swain v. Live Stock Ins. Co.*, 165 Mass., 321; *Hough v. Live Stock Ins. Co.*, 230 Ill. App., 348; *Binnie v. Live Stock Ins. Co.*, 213 Ill. App., 75.

As stated in *Ormond v. Ins. Co., supra*, it is unnecessary for us to consider the other contentions of the defendant.

Applying these principles to the case at bar, we hold that there was no error in granting the motion for judgment as upon nonsuit, and the judgment appealed from is

Affirmed.

STATE v. C. B. BRODIE.

(Filed 25 November, 1925.)

1. Evidence—Witnesses—Opinions.

While a witness may testify to facts within his knowledge, he may also testify under the more modern rules to such as by reason of his personal observation he is in a position to know more accurately than the jury, who have not had such opportunity.

2. Fires—Evidence—Criminal Law—Inventories.

Upon the trial for unlawfully setting fire to his stock of merchandise purchased a few months prior to the occurrence, the former owner, who had made an inventory for the purpose of sale, may testify as to the value of the stock of merchandise at the time of the fire, when he has during the interval observed the merchandise in view of its depletion or replenishment, when relevant to the inquiry.

3. Same—Corroboration.

On trial for the setting fire to his stock of merchandise, which necessarily destroyed the stock of merchandise of another, testimony of such other person that the witness had been previously warned to take out insurance beforehand by the defendant is competent, and that of the wife in corroboration of what her husband told her, is also competent.

4. Same—Insurance—Motive.

Upon the question of the motive of the defendant for setting fire to his stock of merchandise on trial under a criminal indictment, that he had padded his inventory for the purpose of over-insurance, it is competent to show the inventory upon which he had bought it some few months before, with the other evidence in this case as to its value at the time of the fire.

5. Evidence—Character—Admissions—Appeal and Error.

As to the character of the defendant criminally charged with setting fire to his insured stock of merchandise, testimony of a witness that he had previously heard of defendant's setting fire to his stock at other places, etc., will not be considered as prejudicial to defendant when he afterwards admits it as a witness in his own defense.

6. Instructions—Disagreement of Jury—Expression of Opinion—Statutes.

Where the jury in a criminal action have for several days failed to agree, an instruction by the court that he presumed they realized the effect of a disagreement as to the cost to the county, etc., expressly stating he did not want to coerce them into an agreement, is not objectionable as expressing an opinion upon the evidence, or erroneous as against the provisions of our statute on the subject.

APPEAL by defendant from *McElroy, J.*, at April Term, 1925, of STOKES.

The indictment charged the defendant with having set fire to and having burned the storehouse and other buildings of J. B. Woodruff, the

storehouse having been occupied and used at the time by the defendant in carrying on a dry goods business and the other building having been occupied and used by one W. H. Voight as a moving picture show. C. S., 4242.

Woodruff was the owner of both these buildings, which were situated in Walnut Cove. He had conducted a mercantile business in the storehouse for sometime before 3 May, 1923, when he sold his stock of goods and rented the building to the defendant who immediately went into possession. The defendant continued the business there until the fire occurred. In September, 1923, he insured his stock of goods for $6,000; and at one o'clock in the night, 24 January, 1924, a fire broke out and destroyed the entire stock of goods and both buildings. At the trial a large number of witnesses were examined on each side and the jury found the defendant guilty as charged in the indictment. Judgment was pronounced and the defendant appealed. The material exceptions are noted in the opinion.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

N. O. Petree, George Jarvis and Swink, Clement & Hutchins for the defendant.

ADAMS, J. The defendant first assigns as error the admission of Woodruff's testimony as to what the stock of goods was worth on 1 January, 1924. The ground of the exception is the alleged expression of an opinion not formed by the witness upon a personal examination or observation of the goods. It is a familiar principle that one who is called to testify is usually restricted to facts within his knowledge; but if by reason of opportunities for observation he is in a position to judge of the facts more accurately than those who have not had such opportunities, his testimony will not be excluded on the ground that it is a mere expression of opinion. McKelvey on Evidence, 172, 231; *Greensboro v. Garrison, post,* 577; *Hill v. R. R.,* 186 N. C., 475; *Shepherd v. Sellers,* 182 N. C., 701; *Marshall v. Telephone Co.,* 181 N. C., 292.

In assuming that Woodruff's estimate of value was not the result of his personal observation, the defendant is in error. Having made his last inventory about four months before the sale, Woodruff testified that he had gone to the store several times since the sale to see whether the defendant was keeping up the stock of goods and that he had examined it only a few hours before the fire broke out. His "judgment" as to the value of the goods was formed after a personal inspection of the stock on hand. The first exception, then, is without merit.

Voight's testimony that he had carried no insurance (sixth exception) was competent as tending to explain the defendant's request that Voight should take out a policy before the first of the year and that he had given Voight the last warning; and what Mrs. Voight said (seventh exception) was evidently admitted in corroboration of her husband. In *S. v. Bethea,* 186 N. C., 22, it is said that after the credibility of a witness has been impugned by cross-examination it is permissible to corroborate and support his credibility by evidence tending to restore confidence in his veracity and in the truth of his testimony. Voight had been subjected to cross-examination and his wife's testimony referred to circumstances concerning which he had previously testified. Such corroborating evidence may include previous statements, whether near or remote, and whether made pending the controversy or *ante litem motam.* These exceptions must therefore be overruled. *Dellinger v. Building Co.,* 187 N. C., 845; *S. v. Krout,* 183 N. C., 804; *S. v. Exum,* 138 N. C., 600; *S. v. George,* 30 N. C., 324.

Woodruff sold his stock of goods to the defendant on 3 May, 1923. He had taken an inventory on the first day of the preceding January; and the defendant made a similar inventory on 14 May, 1923. The State contended that by sales and by the removal of goods from the storehouse the defendant had reduced the value of his stock very much below the amount of his insurance; and it offered Woodruff's inventory, which was admitted, not as substantive, but as corroborative evidence. To the admission of this evidence the defendant entered exceptions 8, 9, 10, 11. It will be noted that the defendant exhibited his inventory to the insurance agent at the time the policy was issued; that a comparison of the two inventories, item by item, tended to show that the defendant had padded his; and that the vaue of the destroyed goods was far below the face of the policy. Granted this theory, we do not perceive any valid reason for the exclusion of this evidence or that which is the subject of the seventh, twelfth, thirteenth, fourteenth and fifteenth exceptions.

J. M. Stultz, a witness for the defense, testified that he knew the defendant and his wife and that her character was good. On cross-examination he was asked whether "the defendant had the reputation of having had several fires while living in Virginia?" and answered, "I think he had some fires. At least I heard of it. I did not know it to be a fact." Again: Question: "I ask you if the defendant had the general reputation of having had three fires in 1910 and 1911 and collecting insurance on them?" Answer: "I do not know. I heard about the fires but do not know about the insurance." To the admission of this testimony the defendant noted exceptions twenty and twenty-one.

Inquiry into the law concerning such impeaching evidence and the distinctions drawn in several of our decisions in reference thereto is not

necessary to a disposition of these exceptions. With respect to the question the following cases may be consulted: *Barton v. Morphes,* 13 N. C., 520; *S. v. Johnston,* 82 N. C., 589; *S. v. Garland,* 95 N. C., 671; *S. v. Bullard,* 100 N. C., 486; *S. v. Arnold,* 146 N. C., 602; *S. v. Holly,* 155 N. C., 485; *S. v. Cathey,* 170 N. C., 794; *S. v. Killian,* 173 N. C., 792; *S. v. Neville,* 175 N. C., 731; *S. v. Canup,* 180 N. C., 739; *S. v. Baldwin,* 184 N. C., 789.

It is important to observe that Stultz did not testify he knew the defendant's general reputation in regard to the fires; on the contrary he expressly denied all knowledge of such reputation. If there was error in permitting the witness to state what he had heard in regard to the fires, the error was cured by the following admission of the defendant, who subsequently testified in his own behalf: "Brodie Brothers Company owned stock in Virginia and had three fires. Collected insurance on two of them. E. F. Brodie is my wife. We have been married 23 years. I do not remember whether I had any insurance taken out in her name or not. The policy might have been. It could have been in Brodie Brothers Company. I do not remember whether both policies were taken out in Brodie Brothers Company's name or not. I do not remember in what name I collected the insurance. We collected a part of it, nothing like the face of the policy. The one taken out in E. F. Brodie's name, I think, we collected $2,200 on. I am not positive about that. The building was owned by us and also the place was owned by us." The defendant admitted all that Stultz said and more.

For three days the jury had been unable to agree on a verdict and on Saturday morning came into the courtroom and announced that they could not agree. They were requested to give the case further consideration and were afterwards recalled. Not having agreed they were given this instruction: "I presume you gentlemen realize what a disagreement means. It means that four more days of the time of the court will have to be taken up at the expense of several hundred dollars. I do not want to force or coerce you into an agreement and could not if I wished to do so, but still it is your duty as intelligent, reasonable men to consider the evidence, reconcile it, reason the matter over among you and come to an agreement. A mistrial is always a misfortune to any case or to any county. Jurors, if they cannot render verdicts, are entirely useless. It is the duty of jurors to agree if possible and I hope you gentlemen can retire and consider the matter further, reason with each other as intelligent men and come to an agreement." The defendant excepted.

In *S. v. Windley,* 178 N. C., 670, a new trial was granted because the judge had intimated an opinion as to the weight of the evidence, when the jury had not agreed, *Walker J.,* saying: "The judge, in this case, did not enter the verdict and ask if any of the jurors disagreed to it.

as was done in *S. v. Shule, supra,* but the jurors were, in effect, polled and asked if each of them believed the testimony of the defendant, and if so, to hold up his right hand. This was done after a statement by the court of what the defendant, as a witness in his own behalf, has said, and the further remark that he had proved himself to be a man of good character. The court then instructed the jury, that having all of them said that they believed the statement of defendant, he had told them before, and would tell them now, that it is their duty, as jurors, to take the law from the court, and if they believe defendant's testimony, and found the facts which it tends to show, to convict him. There are other expressions of like kind, though somewhat more intensive in form and emphasis." To the same effect is *S. v. Simmons,* 143 N. C., 613. These two cases are in a class which fairly represent the principle on which the defendant relies; and if the principle were applicable here a new trial would be necessary. But in the instruction complained of there is no intimation of an opinion either as to the weight of the evidence or as to the guilt or innocence of the defendant. His Honor told the jury that a mistrial would be unfortunate, but he was very careful to say, while he hoped they would come to an agreement, he had no desire to force or coerce a verdict. In doing so he exercised the prerogative of a judicial officer, and in his instruction there is nothing which warrants a new trial. *Bailey v. Poole,* 35 N. C., 404, 407; *S. v. Robertson,* 121 N. C., 551, 554; *S. v. Southerland,* 178 N. C., 676, 678.

The remaining exceptions require no discussion. We find

No error.

CHARLES HENDERSON ROBERTSON v. HENRY CAMERON ROBERTSON ET AL.

(Filed 25 November, 1925.)

1. Estates—Contingent Remainders—Statutes—Sales—Deeds and Conveyances—Interpretation.

Where lands affected by a contingent interest contained in a deed are decreed to be sold by the court under the provisions of our statute, and the proceeds invested in accordance with the deed, and in furtherance thereof the commissioner who sells the land expressly stated in his deed that the contingencies of the original deed are to be preserved, but contains provisions at slight variation as to the meaning of certain of its terms: *Held,* it was sufficient under the pleading and evidence in this case for the court to reform the commissioner's deed; and, *held further,* these variations will be construed as a mistake of the draftsman, and the limitations construed as expressed in the original deed will control.

2. Same—Equity—Reformation of Deeds—Words and Phrases—Vested Interests—Fee-Simple Title.

A deed declaring a trust with certain contingent limitations over to the living children upon the death of their "father or mother," prior takers of the land: *Held*, construing the instrument to effectuate the intent of the grantor and the early vesting of the estate, the word "or" will be construed in its disjunctive sense, and the surviving children at the death of either parent will take a vested fee-simple estate.

3. Same—"Or" to mean "And."

In construing a deed the word "or" will not be construed to mean "and" unless it is necessary to carry out the expressed intent of the grantor, or such intent is gathered from a correct interpretation of the instrument.

APPEAL by three of the defendants from *Schenck, J.*, at October Term, 1925, of GUILFORD.

Civil action to quiet title and to remove a cloud thereon, arising from claim of defendants to a contingent interest in the real property in question. C. S., 1743.

From a judgment on the pleadings in favor of plaintiff, the defendants, William R. Robertson, Margaret H. Robertson and Lucy Robertson Campbell, appeal, assigning error.

Hines & Kelly for plaintiff.
B. T. Ward for defendants.

STACY, C. J. This is an action, brought under C. S., 1743, to quiet title and to remove a cloud therefrom, which, it is alleged, arises out of a claim by the defendants that they have a contingent remainder interest in the property, and to which plaintiff asserts a full and complete fee-simple title. The primary question involved is the proper construction of the deeds held by the plaintiff to the *locus in quo*.

On 26 October, 1871, Catherine R. Owen, who owned a lot in the town of Hillsboro, Orange County, conveyed the same, by deed properly executed and registered, to David A. Robertson, for the following recited purposes:

"1. For the sole and separate use of the said Mrs. Catherine R. Owen for and during her natural life.

"2. For the said David A. Robertson and Lucy Robertson, his wife, or the survivor of them, for and during the term of his or her natural life.

"3. For the child or children of said Lucy Robertson that may survive their father or mother, or the issue of such and their heirs forever.

"4. On failure of issue of said Lucy Robertson then to William Davies, the grandson of said Catherine R. Owen, and his heirs forever."

David A. Robertson died 12 January, 1883, leaving him surviving his widow, Lucy H. Robertson, and two children by the said Lucy H. Robert-

son, to wit, Charles H. Robertson, then 11 years of age, the present plaintiff herein, and David W. Robertson, then 5 years old, whose children are the appellants in the present case.

After the death of David A. Robertson, Catherine R. Owen and Mrs. Lucy H. Robertson instituted an action in the Superior Court of Orange County at the Fall Term, 1883, in which action said Charles H. Robertson, David W. Robertson and William Davies, all infants at that time, were represented by guardian or next friend. The purpose of said action was to obtain an order for the sale of the lot in Hillsboro, and for the reinvestment of the funds derived therefrom, in a lot in Greensboro, Guilford County. This order was duly entered containing the direction that the deed to the property in Greensboro be taken "for the same persons with the same limitations as those contained in the deed from Catherine R. Owen, dated 26 October, 1871 (with the exception of David A. Robertson, who died on 12 January, 1883)." Supposedly agreeable with the provisions of this order, the deed to the lot in Greensboro, the *locus in quo,* was executed and duly registered, but with the following limitations incorporated therein:

"1. For the sole and separate use of Mrs. Catherine R. Owen for and during her natural life.

"2. For the said Lucy H. Robertson for and during the term of her natural life.

"3. For the child or children of the said Lucy Robertson, that may survive their mother or the issue of such and their heirs forever.

"4. On failure of issue of said Lucy H. Robertson then to William Davies, the grandson of said Catherine R. Owen, and his heirs forever."

This deed, however, recites the whole history of the trust, sets out its initial terms, and contains a declaration that it is intended to preserve and to perpetuate the original trust, established in the deed from Catherine R. Owen to David A. Robertson, bearing date 26 October, 1871, and referred to above.

Catherine R. Owen died sometime prior to 1902. William Davies and David W. Robertson, each, after obtaining his majority, by deed duly executed and registered, conveyed all of his interest in the *locus in quo* to Mrs. Lucy H. Robertson. Thereafter, Mrs. Lucy H. Robertson conveyed all her interest in said lot to the plaintiff.

Mrs. Lucy H. Robertson is still living; she has not remarried since the death of her husband, David A. Robertson, in 1883, and she is now 75 years of age.

The prayer of the complaint is that the plaintiff be declared the absolute owner of an indefeasible fee-simple title to the *locus in quo,* free and clear from any claim, interest or estate, present or future, of the defendants, or any of them.

There being no controversy as to the facts, his Honor rendered judgment on the pleadings in favor of the plaintiff in accordance with the prayer of his complaint. The children of David W. Robertson appeal, contending that they have a contingent interest in said lot of land which would vest immediately upon the death of their father during the lifetime, or before the death, of their grandmother, Mrs. Lucy H. Robertson.

If we look only at the limitations contained in the deed, executed pursuant to the judgment of the Superior Court, directing a sale of the Hillsboro property and a reinvestment in the Greensboro property, the position of the appellants, undoubtedly has some show of merit, but it is conceded that the purpose of this deed was to preserve and to perpetuate the original trust established by the deed from Catherine R. Owen to David A. Robertson, the terms of which are fully set out in the deed conveying the Greensboro property. The rights of the parties, therefore, are to be determined by the provisions of this original deed, the complaint being sufficient, under our liberal practice, to warrant a reformation, if need be, of the latter deed, admittedly executed in furtherance of the first and only design or original trust. But no reformation would seem to be needed as the limitations incorporated therein were but the draftsman's interpretation of the trust created by the first deed, after eliminating from the second deed the name of David A. Robertson, who was dead at the time of its execution. And while this interpretation of the draftsman or the parties appears to be slightly in error, nevertheless, viewing the instrument in its entirety, a position approved in *Triplett v. Williams,* 149 N. C., 394, and *Bagwell v. Hines,* 187 N. C., 690, we think it is clear that its meaning and intent was to preserve and to carry out the one original trust and that it should be construed so as to effectuate this purpose. Such was the direction of the judgment under which it was taken.

We then come to a consideration of the limitations contained in the original deed of 26 October, 1871, from Catherine R. Owen to David A. Robertson, the latter deed, conveying the *locus in quo,* being only a continuation of the trust created by the first deed. The appellants, who are grandchildren of Mrs. Lucy H. and David A. Robertson, claim a contingent interest in the property under the third or following clause in the deed: "For the child or children of said Lucy Robertson that may survive their father or mother, or the issue of such and their heirs forever." The plaintiff, on the other hand, contends that immediately upon the death of David A. Robertson, the children of the said Lucy Robertson and David A. Robertson, who survived their father, took a vested remainder in the property, and that the deeds of said children are sufficient to convey a full and complete fee-simple title to the *locus in*

quo. His Honor held with their view, and rendered judgment accordingly. We think the record supports the ruling.

The appeal presents but a single question of law, and it is this: Did the contingent interests of Mrs. Lucy H. Robertson's children become vested upon the death of their father, or will such interests become vested, so far as the children are concerned, only upon their surviving their mother also? In other words, is the word "or," appearing in clause three, between the words "father" and "mother," to be construed as meaning "or" or "and"? Considering all the purposes of the trust the pertinent and explanatory facts, and the early vesting of estates, which the law favors, to the end that property may be kept in the channels of commerce (*Radford v. Rose,* 178 N. C., 288; *Hilliard v. Kearney,* 45 N. C., 221), we are of opinion that the word "or" should be held to mean "or," and not "and," in the present deed. *McDonald v. Howe,* 178 N. C., 257; *Dunn v. Hines,* 164 N. C., 113; *Galloway v. Carter,* 100 N. C., 111, and cases there cited.

It was the manifest purpose and intent of the grantor that the remainder interests of the children should become vested upon the happening of only one of the contingencies mentioned, to wit, their survival of either their father or their mother, and not necessarily their survival of both. *Springs v. Hopkins,* 171 N. C., 486; *Price v. Johnson,* 90 N. C., 592; *Biddle v. Hoyt,* 54 N. C., 160.

True, the policy of the law is to construe the disjunctive *or* copulatively, or change it to *and,* wherever it is necessary to do so in order to carry out the intention of the maker or the parties to an instrument, and for the further purpose of accelerating the vesting of estates, when this can fairly be done. But we are aware of no case where such change has been made contrary to the principle of early vesting, unless the language of the instrument impelled the interpretation. *Christopher v. Wilson,* 188 N. C., 757; *Ham v. Ham,* 168 N. C., 486, and cases there cited. The present case calls for no change of the disjunctive *or,* in clause three as mentioned above, either for the purpose of effectuating the grantor's intent or to uphold the rule which favors the early vesting of estates.

The remote possibility of further issue by a second marriage, who might fall in the class of "children of said Lucy Robertson that may survive their father or mother," need not be considered so far as the alleged interests of the appellants are concerned.

On the record, we think the judgment in favor of the plaintiff should be upheld.

Affirmed.

R. C. RYAN v. W. M. REYNOLDS, COLEMAN FOSTER AND H. P. FIELDS.

(Filed 25 November, 1925.)

1. **Contracts—Landlord and Tenant — Ejectment — Leases—Re-entry—Possession—Statutes.**

   Our statute writes into a contract of lease of lands when the lease is silent thereon, a forfeiture of the terms of the lease upon failure of the lessee to pay the rent within ten days after a demand is made by the lessor or his agent for all past due rent, with right of the lessor to enter and dispossess the lessee. C. S., 2343.

2. **Statutes—In Pari Materia—Interpretation—Landlord and Tenant.**

   C. S., 2343, allowing the lessor the right of entry upon the leased premises upon failure of the lessee to pay the rent, etc., and C. S., 2372, are *in pari materia*, and should be construed together.

3. **Landlord and Tenant — Leases — Ejectment — Statutes—Payment—Tender.**

   Under the provisions of C. S., 2372, the lessee in summary ejectment is given the right to tender or pay into court the amount of rent due under the lease to the time of the beginning of the action, with interest and costs, and upon his so doing, the proceedings will be stayed, and the exception of the lessor that all rents whether due under the terms of the contract or not, should be included to the time of the dismissal of the action, is untenable.

4. **Same—Nonsuit—Appeal and Error.**

   Where there is an appeal from the justice of the peace in ejectment, the jury shall assess all damages of the plaintiff when he is entitled thereto from the time of the unlawful detention to the time of the trial in the Superior Court, and upon the defendant's tendering the amount sued for and the costs to the time, a judgment as of nonsuit is properly allowed.

5. **Same—Separate Contracts—Interpretation.**

   Where a contract for the lease of land at a specified rent contains a provision giving to the lessee the right to take sand therefrom at a stated price, the lessor in ejectment cannot maintain the position that the lessee should tender or pay for the sand he may thus have used, under the provision of C. S., 2372, as a part of the rental due by him, the contract being construed separately as to the two provisions.

APPEAL by plaintiff from *Finley, J.*, September Term, 1925, of FORSYTH. Affirmed.

The return of the justice of the peace on appeal to the Superior Court by defendants is as follows: "On 14 July, 1925, at the request of the plaintiff, I issued a summons in his favor and against the defendants, which is herewith sent. Said summons was, on the return day thereof, returned before me at my office; and at the same time and place, the parties personally appeared. The plaintiff complained for possession of

the premises occupied by the defendants and fifty dollars for rent from 29 July, 1924, to 29 July, 1925. The defendant denied. . . . Both parties introduced evidence upon the claims as made by him, and after hearing their proofs and allegations, I render judgment in favor of the plaintiff and against the defendants, on 1 August, 1925, for $50.00, with interest on $50.00 from 29 July, 1925, and for $8.00 cost."

The following judgment was rendered in the court below: "This cause coming on to be heard and being heard before his Honor, T. B. Finley, judge presiding, at the September Term, 1925, of the Superior Court for Forsyth County, and a jury, and it appearing to his Honor that when the case was called for trial the defendants tendered the sum of $50.00 and interest, together with $25.00 to pay the costs, and his Honor further finds it a fact that upon the close of the testimony of the plaintiff the defendants tendered to the plaintiff $140.00, out of which to pay the rent due and the costs of the action. His Honor finds as a fact from the evidence given by the deputy clerk that the costs in this case are $54.35. His Honor further finds that this is an appeal from the court of a justice of the peace, and that the plaintiff in his summons demanded the possession of the premises occupied by the defendants and $50.00 rent from 29 July, 1924, to 29 July, 1925, and his Honor further finds it a fact that in the magistrate's returns he set forth that the plaintiff complained for the possession of the premises occupied by the defendants and $50.00 for rent from 29 July, 1924 to 29 July, 1925. His Honor further finds as a fact, that on 24 July, 1925, the defendants tendered to the plaintiff $25.00 rent, which would be due under the contract 29 July, and the same was not accepted, but did not tender rent claimed by plaintiff to be then due. His Honor finds as a fact, that the rent due at the beginning of this action and the rent accruing since the beginning of this action has been tendered to the plaintiff by the defendants, together with interest, and his Honor further finds as a fact that this is an action brought to recover the possession of demised premises upon a forfeiture for the nonpayment of rent, and that before judgment, the defendants tendered all rent due with interest, together with the costs which tender was made during the trial in the Superior Court. His Honor further finds that the plaintiff refused the tender made by the defendants and the motion was allowed. It is further found as a fact that on the appeal to the Superior Court and on the trial in the Superior Court the plaintiff demanded and moved that damages and all rent be assessed and found that was due as found up to the trial in the Superior Court. Now, therefore, it is ordered, adjudged and decreed that all further proceedings in this case shall cease."

At the close of the testimony for the plaintiff, the defendants moved for judgment as of nonsuit, and it appearing to the court that the de-

fendants have made a tender of all rents and cost due up to the present time, motion allowed. Plaintiff moves that all rent and damages up until the time of the trial be assessed in the trial of this cause. Motion denied.

Judgment was signed as appears of record. Plaintiff assigned the following as error and appealed to the Supreme Court: "(1) For that his Honor erred in allowing the motion for judgment as of nonsuit; (2) for that his Honor erred in overruling the plaintiff's motion that all rent and damages up until the present time be assessed in the trial of this cause."

Other relevant facts will be set forth in the opinion.

John C. Wallace and Raymond G. Parker for plaintiff.
Parrish & Deal for defendants.

CLARKSON, J. From an examination of the lease in controversy, made by plaintiff, there is no clause giving him a right of reëntry for the nonpayment of rent. The lease is for 5 years with renewal privilege or right for 5 additional years, rent $25.00, payable semiannually in advance. *Simmons v. Jarman,* 122 N. C., p. 195.

It is laid down in *House v. Parker,* 181 N. C., 42, and accepted law in this jurisdiction: "It is true the contract contains no express power of sale; but the general laws of the State in force at the time of its execution and performance enter into and become as much a part of the contract as if they were expressly referred to or incorporated in its terms. *O'Kelley v. Williams,* 84 N. C., 281; *Graves v. Howard,* 159 N. C., 594, and *Van Huffman v. Quincy,* 4 Wallace, 552." Plaintiff relies on the statutory right as follows:

C. S., 2343. "In all verbal or written leases of real property of any kind in which is fixed a definite time for the payment of the rent reserved therein, there shall be implied a forfeiture of the term upon failure to pay the rent within ten days after a demand is made by the lessor or his agent on said lessee for all past due rent, and the lessor may forthwith enter and dispossess the tenant without having declared such forfeiture or reserved the right of reëntry in the lease."

The statute was passed to protect landlords who made verbal or written leases and omitted in their contracts to make provision for reëntry on nonpayment of rent when due. The consequence was that often an insolvent lessee would avoid payment of rent, refuse to vacate and stay on until his term expired. In the present case suit was commenced before the justice of the peace for $50.00 rent and a summary action of ejectment against defendants. The justice of the peace gave judgment for the $50.00 and cost and his returns show that the action before him was for this amount and possession of the premises.

The defendants, through their attorneys, before the trial of the case in the Superior Court on appeal, made the following motion: "Now, if your Honor pleases, we tender this motion: The defendants herein pursuant to and by virtue of section 2372 of the Consolidated Statutes, do hereby tender in cash the sum of $50.00, the rent which the plaintiff claims to be due, and do hereby tender $50.00 as costs, or so much thereof as may be necessary to pay the costs of this action, and prays that further action may cease. The plaintiff declined to accept the tender, as above stated. The defendants, through counsel, presented to the court the sum of $75.00 pursuant to the tender."

C. S., 2372, is as follows: "If, in any action brought to recover the possession of demised premises upon a forfeiture for the nonpayment of rent, the tenant, before judgment given in such action, pays or tenders the rent due and the costs of the action, all further proceedings in such action shall cease. If the plaintiff further prosecutes his action, and the defendant pays into court for the use of the plaintiff a sum equal to that which shall be found to be due, and the costs, to the time of such payment, or to the time of a tender and refusal, if one has occurred, the defendant shall recover from the plaintiff all subsequent costs; the plaintiff shall be allowed to receive the sum paid into court for his use, and the proceedings shall be stayed."

The court overruled the defendants' motion for the time being and heard the evidence. At the conclusion of the evidence, the court below allowed the motion of nonsuit and signed the judgment as above set forth. The action was tried out on claim set forth in the justice of the peace's return—$50.00 rent and possession of the premises leased.

C. S., 2372, was passed in the interest of the tenant. A landlord could bring an action after demand as required by the statute, when each installment of rent was due. The tenant had to pay the rent and cost before judgment or get out. This statute was to protect the tenant from hasty eviction, at the same time the landlord obtained his rent and cost. The two statutes construed together are just and equitable. The forfeiture which gives right of eviction in the present lease is made so purely by statute. The parties could have agreed in the lease upon strict terms as in *Midimis v. Murrell,* 189 N. C., 740. There the lessor and lessee agreed that the lessor had the option to declare the lease "null and void" upon failure to pay the rent. In the instant case the statutory forfeiture is saved by a statutory right to pay rent sued for and cost before judgment. The two statutes must be construed together—*in pari materia.*

C. S., 2371, is as follows: "On appeal to the Superior Court, the jury trying the issue joined shall assess the damages of the plaintiff for the detention of his possession to the time of the trial in that court, and

judgment for the rent in arrear and for the damages assessed may, on motion, be rendered against the sureties to the appeal."

The present suit was for one year's rent—$50.00—and possession of the property. The rent due since this action was instituted—$25.00—was tendered and refused by the plaintiff. The court below found this as a fact, but upon the payment of the $50.00 sued for, $25.00 rent due since action was instituted, and cost, the court below allowed defendant's motion of nonsuit. Plaintiff in his brief says: "At the trial in the Superior Court the defendant tendered rent and cost due, except that which was due for sand removed, which was not tendered." *Dunn v. Patrick,* 156 N. C., 248. There was a controversy in the beginning over the $50.00 by Coleman Foster, who was the assignee of Reynolds & Fields, and plaintiff sued all three—Foster in the beginning claiming his assignors were liable.

The next contention of plaintiff was that, under C. S., 2371, *supra,* the amount due for sand removed should be assessed up to the time of trial as rent or damages. That 3,000 to 5,000 yards of sand were removed and not paid for, and this was certainly rent or damages.

The language of the lease, clause 2d, is as follows:
"The annual rent during the term shall be $50.00 payable in advance, $25.00 semiannually." The 3d clause gives to the lessees, their heirs and assigns, the privilege to remove sand from the bed of the creek and to pay plaintiff 10c per yard for the sand taken and carried away. There is nothing in the language of the lease or otherwise that indicates that this 10c a yard is rent. It is simply an agreement between the parties to pay for sand as taken at a fixed price. Defendants need not take the sand, but "the privilege" is given. When taken, plaintiff has a right to an action for the price stipulated. This Court cannot make a lease, its only power is to construe one made.

In C. S., 2371, *supra,* the language clearly says the jury shall assess damages for the detention of his possession. Here the amount fixed is the rent and the term has not expired. The plaintiff cannot "tack on" to the rent contract the sand agreement, although both are in the same lease. The language of the lease does not permit this to be done.

It was contended by defendants on the argument that, under the contract which was for 5 years with privilege of renewal for 5 years; that the defendants have made very valuable improvements on the land and a "strict forfeiture" would confiscate these improvements. Both statutes use the word "forfeiture" and C. S., 2372, gives the remedy to the tenant upon forfeiture for the nonpayment of rent. The statute declares the meaning—that tenant shall pay all back rent, etc., and cost before judgment. From a careful review of the record, the judgment of the court below is

Affirmed.

CITY OF DURHAM v. R. H. WRIGHT.

(Filed 25 November, 1925.)

1. Municipal Corporations—Cities and Towns—Streets—Dedication—Permissive User.

Where a store building has been built by the owner several feet from the line of a city street, with projections or pilasters at each side up to the street line, and has excavated the cellar of the store thereto, it is sufficient evidence that no dedication to the public use was intended to be made or actually made by the owner, and the use of this strip of land by the public in going into and out of the store, and for kindred purposes, amounted only to a permissive user.

2. Same—Constitutional Law.

The principle upon which private property may not be taken for a public use, without just compensation, though not contained in the Constitution of our State, has become a part of our organic law.

3. Same—Statutes.

In order for a city to acquire by condemnation private lands for street purposes under a special statute providing that in the absence of any contract or contracts therewith in relation to lands used or occupied by it for the purposes of streets, etc., it shall be presumed that the land has been granted to it by the owner, unless the owner, etc., at the time apply for an assessment within two years, etc., it must be shown that the *locus in quo* had been taken and adversely used for street purposes for the stated time, and a permissive use is insufficient.

4. Same—Prescriptions.

In order for a municipal corporation to acquire the lands of a private owner under a claim of dedication by prescription, it is required that there must be a continued and uninterrupted adverse use, and a permissive use is insufficient.

APPEAL by plaintiff from *Calvert, J.*, at March Term, 1925, of DURHAM. No error.

This was a condemnation proceeding brought by the city of Durham against defendant to widen "East Main Street" on the south side and under its charter to condemn a part of defendant's land for the purpose of making a sidewalk in front of defendant's property approximately 10 feet wide. The property to be condemned for the sidewalk is particularly described in the petition. It does not include the *locus in quo* which the city claims, but certain "pilasters" or projecting wall.

Defendant contends: "That it is the purpose of plaintiff to condemn the two very small pieces of land belonging to defendant and described in the petition and to pay for the same what the commissioners shall or have assessed as the value of the same, and also to acquire by means of its petition, title not only to the two pieces of land described in the

petition, but to the strip 34.3 (4) feet long and about 35 inches wide, which lies between the two small parcels sought to be condemned. Plaintiff claims to own the last described piece of property by reason of occupancy for two years by the public. But this claim is unfounded because it has neither been dedicated nor donated to the public by the owner; nor has it been acquired by the public or by the city by two years possession, hostile and adverse to the owner. It has been for two years and more used in connection with defendant's store; and any use by the public has been always permissive, and for the benefit of the store and its occupant; and defendant has always occupied the subsurface of said land with his basement, and never thought of surrendering possession of the surface, nor of donating it to the public. Plaintiff well knew this; but now seeks to condemn the two pieces of land at the ends of this strip; and 'to tack' to the ownership of those two pieces its claim of adverse possession to the remainder by reason of its alleged occupancy, and thus acquire defendant's property for a small fraction of its real value."

This suit narrows itself to a contest over whether the city of Durham or defendant, Wright, owns a strip of land *34.4 feet in length* and *about 35 inches (nearly 3 feet) in width.* It was agreed between the parties to the suit "that the facts raised by the pleadings and evidence should be found by the court instead of a jury." The facts found show that about the year 1894, Rufus Massey, a resident of Durham, when he erected the two-story brick buildings on his lot on south side of East Main Street in the city of Durham, had the north walls set back about 35 inches (nearly 3 feet) from the northern boundary line of the lots on which they were erected and have remained so ever since. A strip 34.4 feet in length and 35 inches in width, left in front of his store building, and between the building and the street line, the east and west walls of the building project and extend (pilasters) to the street line. There were two stores separated by partitions on the first floor and under the building there is a basement and it takes up the entire land to the street line. Defendant purchased the land from the heirs at law, including the *locus in quo,* 5 February, 1920. Massey died in the year 1919. Prior to 1912, Massey had planks laid on the *locus in quo,* and while the planks were laid the city of Durham laid a brick sidewalk in front of the lot, but not on the *locus in quo.* In 1916 Massey took up the planks on the *locus in quo* and put down cement. Later the city replaced the brick with a cement sidewalk.

The court below found as a fact: "That neither the defendant nor his predecessors in title have ever admitted the right of the city to control the strip of land between the north wall of said buildings and the northern boundary line of said lots, nor have they ever admitted that the

city of Durham had any title thereto, and said city has never paid the defendant nor his predecessors in title, any compensation for the land comprising said strip, and those under whom he claims have at all times claimed title thereto. . . . It is also admitted that neither the defendant nor his predecessors in title have ever done anything to prevent the public from using said space. . . . That from 6 March, 1899, to the date of the condemnation proceeding above referred to, persons, both residents and nonresidents of the city of Durham, could and did use the strip of land in question for usual or ordinary purposes of a sidewalk, as for instance that they did come upon it and did walk over and across it to look in the windows of the stores, and also when many persons were using the sidewalk outside, the northern line of the property in question, which frequently happened, persons would and did divert their steps therefrom and passed to and fro along the said strip and between the pilasters herein condemned."

The other facts found are mostly evidentiary on both sides and will not be repeated, as not material.

The court below found the facts—that the *locus in quo* was the property of defendant. Plaintiff assigned the following error and appealed to the Supreme Court: "For that the court included the following in the finding of facts: (a) The court further finds that there has not been a dedication of the land in question; that there has not been a prior condemnation than that herein; and that if the act of 6 March, 1899, has application to such property as that in controversy, then there has not been such use and occupation of the said property by the city of Durham as to constitute a taking within the meaning of the statute."

W. J. Brogden and W. S. Lockhart for plaintiff.
Fuller & Fuller and Pou & Pou for defendant.

CLARKSON, J. The city of Durham claims to own the *locus in quo*—a strip of land 34.4 feet in length and 35 inches (nearly 3 feet) in width, between the projections (or pilasters) of the sidewalks of the building. It has never paid any "just compensation" for it, but claims it (1) by dedication, (2) by prescription, (3) under statutory dedication or authority. We do not think the position of the city can be sustained.

In *Shute v. Monroe*, 187 N. C., p. 683, it was said: "The Anglo-Saxon holds no material thing dearer than the ownership of the land; his home is termed his 'castle.' Although there is nothing in the Constitution of North Carolina that expressly prohibits the taking of private property for public use without compensation (the clause in the United States Constitution to that effect applies only to act by the United States

and not to government of the State), yet the principle is so grounded in natural equity and justice that it is a part of the fundamental law of this State that private property cannot be taken for public use without just compensation. *Johnston v. Rankin,* 70 N. C., 555." *Wade v. Highway Commission,* 188 N. C., 210; *Stamey v. Burnsville,* 189 N. C., 39; *Finger v. Spinning Co., ante,* 74.

Hoke, J., in *Tise v. Whitaker,* 146 N. C., p. 375, lays down the rule long recognized in this State: "It is well understood with us that the right to a public way cannot be acquired by adverse user, and by that alone, for any period short of twenty years. It is also established that, if there is a dedication by the owner, completed by acceptance on the part of the public, or by any persons in a position to act for them, the right at once arises, and the time of user is no longer material. The dedication may be either in express terms, or it may be implied from conduct on the part of the owner; and, while an intent to dedicate on the part of the owner is usually required, it is also held that the conduct of the owner may, under certain circumstances, work a dedication of a right of way on his part, though an actual intent to dedicate may not exist. These principles are very generally recognized and have been applied with us in numerous and well considered decisions," and cases cited. *Draper v. Conner,* 187 N. C., 18, and cases cited; 18 C. J., pp. 40, 41 and 51.

It is, we think, sufficiently clear from the findings of fact that neither the defendant, nor his predecessor in title, ever intended to dedicate the strip of land to the public for use as a sidewalk, and the projections (pilasters) of the east and west walls of the building were made and erected for the purpose of marking the boundaries of the lot, and were notice to the world that the strip of land connecting them was a part of the lot upon which the projections were erected, thus negativing a dedication.

The land under the *locus in quo* was admittedly used as a basement by defendant and those under whom he claimed. The fact that the public crossed the *locus in quo* to get to the place of business, go into the stores, or went around the pilasters and got on the *locus in quo* as they walked along the street, was only permissive. At all time the pilasters stood there marking the corners of the lot. The facts show that there was no adverse user by the city and no dedication by the owners. Plaintiff further contends that there was a statutory dedication and cites the charter of the city of Durham, chap. 142, sec. 66, Private Laws 1921, and chap. 235, sec. 60, Private Laws 1899, ratified 6 March, 1899, which is as follows: "That in the absence of any contract or contracts with said city in relation to the lands used or occupied by it for the purpose of streets, sidewalks, alleys or other public works of said city,

signed by the owner thereof, or his agent, it shall be presumed that the said land has been granted to said city by the owner or owners thereof, and said city shall have good right and title thereto, and shall have, hold and enjoy the same as long as the same shall be used for the purpose of the said city, and no longer. Unless the owner or owners of said land, or those claiming under them shall, at the time of the occupation of the said land, as aforesaid, apply for an assessment of said land, as provided for in the charter of said city, within two years next after said land was taken, he or they shall be forever barred from recovering said land, or having any assessment or compensation therefor; *Provided,* nothing herein contained shall effect (affect) the rights of feme coverts or infants until two years after the removal of their respective disabilities." There is a slight difference between the two acts, but not material.

The record shows that none of those who claim the *locus in quo* have been under disabilities since 6 March, 1899. From a careful anlaysis of this section, it will be seen before this statute is applicable that the *locus in quo* must be *used or occupied* for the purpose of a street, and the land *was taken.* In other words, from a construction of the entire statute, there must be an adverse user before the city can acquire title. Black's Law Dictionary, 2 ed., p. 846, defines "occupation": "In its usual sense 'occupation' is where a person exercises physical control over land. Thus, the lessee of a house is in occupation of it so long as he has the power of entering into and staying there at pleasure, and of excluding all other persons (or all except one or more specified persons) for the use of it. Occupation is therefore the same thing as actual possession. Sweet. The word 'occupation' applied to real property, is, ordinarily, equivalent to 'possession.' In connection with other expressions, it may mean that the party should be living upon the premises; but, standing alone, it is satisfied by actual possession. *Lawrence v. Fulton,* 19 Cal., 683." Occupied indicates *pedis possessio.* Black, *supra,* p. 1134, defines "take": "To lay hold of; to gain or receive into possession; to seize; to deprive one of possession of; to assume ownership. Thus, it is a constitutional provision that a man's property shall not be *taken* for public uses without just compensation. *Evansville & C. R. Co. v. Dick,* 9 Ind., 433."

Plaintiff contends further: "In addition to a statutory dedication in this case, there was a dedication by prescription." In 9 R. C. L., p. 772, it is laid down: "To establish an easement by prescription there must be, first, continued and uninterrupted use or enjoyment; second, identity of the thing enjoyed; third, a claim of right adverse to the owner of the soil, known to and acquiesced in by him." *Draper v. Conner, supra;* 19 C. J., p. 873, *et seq.* The facts show no prescriptive right. There was no grant, dedication, prescription or statutory authority of the easement.

In the present case it is admitted that nothing has been paid for the *locus in quo* by the city of Durham. The municipality claims that it has a right to the land for street purposes, by dedication, prescription and statutory authority. We think the entire evidence shows that defendant and those from whom he claimed always exercised control and dominion over it and never dedicated it to the city, nor does the evidence show any prescriptive right. The "pilasters" were landmarks of ownership. The going in and out of the store over the *locus in quo* was permissive and the public going around the "pilasters" and over the *locus in quo* in no way gave the city an easement. There is no evidence from the findings that give a right to plaintiff to have an easement over this land for street purposes either by dedication, prescription or statutory authority. The statutory authority was never complied with, it neither occupied nor was the land taken by the city. The city desires the land for street purposes, and just compensation must be given the owner. The law gives the machinery. A jury assesses its value.

For the reasons given, we find

No error.

BURKETT PURNELL, SR., ADMINISTRATOR OF CLEMMONS PURNELL, v. ROCKINGHAM RAILROAD COMPANY.

(Filed 25 November, 1925.)

1. Negligence—Killing of Deceased—Damages—Statutes.

At common law, a civil action would not lie against one who had negligently caused the death of another, but now exists to the personal representative of the deceased by statute. C. S., 161.

2. Same—Measure of Damages.

The measure of damages for negligently causing the death of another, is the present value of the net income to the estate, to be ascertained by deducting the cost of living of the deceased, and his necessary personal expenditures, from the gross income to be ascertained from his expectancy of life, of which the mortuary tables may be received in evidence, with proof as to the condition of his previous health, etc.

3. Same—Instructions.

Construing the charge as a whole from its related parts: *Held*, an instruction is not erroneous as to the measure of damages for the negligent killing of another, which charges that his probable expenditures, etc., are to be deducted from the gross income when from connected parts of the charge the jury must reasonably have understood that it was the necessary personal expenses which they should deduct.

APPEAL by the plaintiff from *Bryson, J.,* at June Term, 1925, of RICHMOND.

The action was brought to recover damages for the wrongful death of the plaintiff's intestate, who at the time of his injury was a boy ten years of age, of bright mind; of good health, habits and character; and of fine physique. The issues were answered as follows:

1. Was the injury and death of the plaintiff's intestate, Clemmons Purnell, caused by the negligence of the defendant as alleged in the complaint? Answer: Yes.

2. Did the said Clemmons Purnell by his own negligence contribute to and cause his own injury and death as alleged in the answer? Answer: No.

3. Was the injury and death of Clemmons Purnell caused by the negligence of Burkett Purnell as alleged in the answer? Answer: No.

4. What damage, if any, is plaintiff entitled to recover of the defendant? Answer: $1,000.

The plaintiff's motion to set aside the answer to the fourth issue for insufficiency of the damages was denied and the plaintiff excepted. There was a judgment in his favor of $1,000. The plaintiff assigns as error two instructions which were given by the court as to the measure of damages:

"1. I give you the rule as to award and damage for the wrongful death applicable in the State of North Carolina and direct you to observe it and none other. Where one's death is caused by the negligent acts of another, proximately producing it, the amount of award or the damage is subject to the following rule: The award is the present value of the net pecuniary worth of the deceased, to be ascertained by deducting the cost of his own living and expenditures from the gross income based upon his life expectancy.

"2. After subtracting his personal expenditures from that amount they thus reach what is known in law as his net income, and having deducted this amount, then they determine what is the present pecuniary value of such an amount, and having done so, the sum arrived at would be the amount of the award."

H. F. Seawell for plaintiff.
Bynum & Henry for defendant.

ADAMS, J. At common law a civil action could not be maintained against one who had negligently caused the death of another (*Craig v. Lumber Co.,* 189 N. C., 137), but in 1854 the Legislature enacted a statute authorizing suit by the personal representative of any person whose death had been caused by neglect, default, or wrongful act. Laws

of N. C., 1854, ch. 39. It was provided in section 3 that the jury might give such damages as they should deem fair and just, having regard to the pecuniary injury resulting from the wrongful death. The substance of this statute was brought forward by the Legislature of 1868-'9 (ch. 113), and it was enacted that the plaintiff might recover "such damages as are a fair and just compensation for the pecuniary injury resulting from such death." This is the language of the statute now in force. C. S., 161.

In *Kesler v. Smith,* 66 N. C., 154, *Reade, J.,* construing the act of 1854, stated the rule for damages to be the "reasonable expectation of pecuniary advantage from the continuance of the life of the deceased." This statement was approved in *Burton v. R. R.,* 82 N. C., 505; but in *Pickett v. R. R.,* 117 N. C., 639, this Court disapproved an extension of the rule as made by the trial judge and held that the measure of damages for the loss of a human life is the present value of the net income to be ascertained by deducting the cost of living and expenditures from the gross income, and that the jury could not allow more than the present value of the accumulation arising from such net income based upon the expectancy of life. This ruling was approved in *Benton v. R. R.,* 122 N. C., 1007, in which *Kesler v. Smith, supra* and *Burton v. R. R., supra,* were cited as authorities, although there is an intimation in *Bradley v. R. R.,* 122 N. C., 972, that the opinion in *Kesler's case* followed the English rule. However, in *Poe v. R. R.,* 141 N. C., 525, *Walker, J.,* suggested that *Pickett's case* stated more definitely than *Kesler's case* the proper method of calculation. It will be noted that in *Pickett's case* the words "deducting the cost of living and expenditures from the gross income" were approved by this Court on appeal. This identical language or the substance of it was reiterated and confirmed in *Mendenhall v. R. R.,* 123 N. C., 275; *Russell v. Steamboat Co.,* 126 N. C., 961; *Watson v. R. R.,* 133 N. C., 188, and in *Gerringer v. R. R.,* 146 N. C., 32.

It is true that in *Carter v. R. R.,* 139 N. C., 499, the charge was criticised because it directed the jury to deduct from the gross income such expenditures as they should find the deceased would have made; and it is said that the true rule requires the jury to deduct only the reasonably necessary personal expenses of the deceased, taking into consideration his age, manner of living, etc. The use of the word "expenditures" was not sanctioned because in the absence of any explanation it was thought the jury might have understood the word to embrace the amount expended by the deceased for the benefit of his family or those dependent upon him. See, also, *Roberson v. Lumber Co.,* 154 N. C., 328, and *Rigsbee v. R. R., ante,* 234. The objection to the use of the word "expenditures" as stated in *Carter v. R. R., supra,* is met in the case at bar by the following specific instruction of the trial judge: "Where one

comes to his death by actionable negligence upon the part of another, the jury, in considering the award of damages, if they reach such consideration, will, first, from the testimony determine the probable life expectancy of the deceased, the probable number of years that he would have lived had death not cut short the thread of life. Having done so, then from all the facts disclosed by the testimony, the jury will determine the probable amount that he would have made during his probable life expectancy and when they have done this, they have reached what the law styles as his gross income. Having determined the amount of the gross income in this way, then they next should proceed to inquire what would have been his reasonable personal expenses as disclosed by the evidence. In order to arrive at this amount, they again consider what was his probable life expectancy and what he spent upon himself or would likely have spent upon himself; they then reach the amount of the probable amount of his personal expenditures." By a fair interpretation of this instruction it will be seen that the use of the word "expenditures" could only have been understood as embracing the personal expenses of the deceased and not expenditures for his family or those dependent upon him. Thus the instruction is brought directly in line with the authorities affirming the decision in *Pickett v. R. R., supra.* The first exception therefore must be overruled.

With the respect to the second exception the appellant contends that the trial judge instructed the jury to ascertain the gross earnings and the personal expenditures and to subtract the latter from the former, and in this way to find the net income of the deceased; then to deduct the net income from something that is not defined, and to determine the present pecuniary value of such amount by a method not stated; and finally that the sum thus arrived at would be the answer to the fourth issue.

In our opinion the instruction is not reasonably susceptible of this interpretation. The words "and having deducted this amount" evidently refer to the personal expenses of the deceased and not to the net income; and as indicated the deduction was to be made, not from an unknown quantity, but from the gross income. The charge, of course, must be considered in its entirety, in the connected way in which it was given and on the presumption that the jury did not disregard it; and if it presents the law fairly and correctly it will afford no ground for reversal, though expressions standing alone may be technically incorrect. *White v. Hines,* 182 N. C., 275; *Sutton v. Melton,* 183 N. C., 369; *Rierson v. Steel Co.,* 184 N. C., 363; *S. v. Dill,* 184 N. C., 645. We find

No error.

CITY OF GREENSBORO v. A. D. GARRISON AND ROXIE M. GARRISON, HIS WIFE.

(Filed 25 November, 1925.)

1. Evidence—Opinion.

The evidence of witnesses who have had observation of certain conditions relevant and material to the inquiry involved in the action, is more broadly received now than heretofore, upon the ground that it is more enlightening to the jury who could not have had this opportunity, and aids them in their conclusion.

2. Same—Municipal Corporations—Cities and Towns—Condemnation—Damages.

Upon the measure of damages to be paid to the owner for the taking of his land for a ditch to be used by a city in connection with its public works, it is competent for a witness to state that before the final completion of the ditch, he had observed the property, and to give his estimate of the difference in value of the owner's land just before and after the time of its appropriation.

3. Same—Appeal and Error—Harmless Error.

Upon the question of the measure of damages to be paid to the private owner of land for its taking by a city for public use, it is harmless error to the city to reject its testimony tending to show the owner's idea of his damages in a conversation with an employee of the city, authorized by it as its agent in this matter, when the other evidence in the case sufficiently covers the evidence sought to be elicited.

APPEAL by plaintiff from *McElroy, J.*, at March Term, 1925, of GUILFORD.

Under authority conferred by Private Laws 1925, ch. 37, the city of Greensboro instituted a proceeding to condemn a right of way ten feet wide over the land of the respondents for the construction of a sewer line connecting Arlington and Vance streets. Appraisers were appointed and they made their report, assessing damages. To this award the city and the property owners excepted, and appealed to the Superior Court. It was admitted upon the trial that the respondents are the owners in fee of the land described in the pleadings; that the city has the right of condemnation; that the proceeding was regular; and that only the issue of damages was to be determined. The jury heard the evidence and assessed damages. Judgment was rendered for owners of the property, and the city appealed assigning error.

Fentress & Moseley for appellant.
Frazier & Frazier for appellees.

ADAMS, J. G. C. Hill, a witness for the respondents, went to Garrison's home and looked over the premises while the ditch was open. On

the direct examination he was permitted after objection to express his opinion as to the difference in the fair market value of the property just before and just after the construction of the sewer. He testified on the cross-examination: "I do not know of my own knowledge that this ditch has ever been closed up. I judge that the ditch has been closed up. I am basing my estimate on the ditch open, that is, when I saw it." On the redirect examination, in answer to a hypothetical question to which there was no objection, he gave his estimate of the decreased value of the property on the assumption that the sewer line had been laid and the ditch closed.

McKelvey, in his work on Evidence, 231, observes there are two classes of witnesses who are ordinarily spoken of as experts,—one class embracing these persons who, by reason of special opportunities for observation, are in a position to judge of the nature and effect of certain matters better than persons who have not had opportunity for like observation. Referring to the subject in *Harper v. Lenoir,* 152 N. C., 723, 730, the Court said: "Evidence of this character from witnesses who have had personal observation of relevant facts and conditions, and whose opinion is calculated to aid the jury to a correct conclusion, is coming to be more and more regarded as competent, and its reception has been sanctioned and approved in several recent decisions of the Court." The general principle upon which this class of evidence is admitted is laid down in 4 Wigmore on Evidence, 2 ed. sec. 1917, and approved among others in the following cases: *Taylor v. Security Co.,* 145 N. C., 383; *Wade v. Telephone Co.,* 147 N. C., 219; *Davenport v. R. R.,* 148 N. C., 287, 294; *Wilkinson v. Dunbar,* 149 N. C., 20; *Lumber Co. v. R. R.,* 151 N. C., 217; *R. R. v. Mfg. Co.,* 169 N. C., 156; *Lambeth v. Thomasville,* 179 N. C., 452; *Hill v. R. R.,* 186 N. C., 476.

The appellant admits the general principle but contends that under the peculiar circumstances of the case the witness was not qualified to express an opinion as to the decreased value of the property after the ditch had been closed. It will be noted that the question objected to was addressed to "the difference in the fair market value of the property of Mr. Garrison just before and just after the taking of the right of way for the sewer line and the building of the sewer line." Also that the estimate of the witness was based upon his personal observation of the land as he saw it when the ditch was open. As tending to show his estimate of value made upon observation the evidence was not incompetent merely because the work had not then been completed. The dimensions of the ditch had previously been described by Garrison; and as the witness was afterwards permitted without objection to give his estimate of damages resulting from the completed work we see no satis-

factory reason for excluding the estimate made upon his observation of the open ditch. In any event it was a circumstance for the consideration of the jury.

The second exception was taken to the exclusion of the testimony of M. M. Boyles, a witness for the city. He was an engineer of the water and sewer department and supervised the construction of the sewer line through Garrison's lot. If admitted, his testimony would have been as follows: "When I went to see Mr. Garrison, I told him that we wanted to run a sewer across his property. I told him that we wanted to run the sewer line where it was finally located, and went into some details about it. The plan and profiles of that plan had already been prepared. He did not make me a proposition to grant the easement for so much money but for certain work to be done; that is certain work on the open ditch across his lot." "Q. What was the figure you named as being sufficient to cover the ditch, and which he said would be satisfactory to him in consideration of his giving the city the right to build the line? A. According to the figures I told him it was $350.00. Q. What did he tell you that the line could be built for? A. He told me, basing it on the concrete that he had put in the sides and bottom, that it ought not to cost over $100.00 or $125.00."

The city contends that Garrison's statement was equivalent to an offer to sell for a named price and involved his estimate as to the value of the easement; the respondents contend that the offer was in the nature of a compromise and therefore inadmissible.

An unaccepted offer of compromise made pending the treaty cannot be proved; but here the city insists that no treaty was pending. It is true that no proceeding had been instituted for the appropriation of the property; but this does not mean that the negotiations of the parties were not sanctioned by law. A former charter of the city was repealed and another act of incorporation was passed by the Legislature in 1923. Private Laws, ch. 37. Section 72 provides that if land or a right of way shall be required for any of the purposes authorized by the charter and the owner and the city council cannot agree upon the compensation the property may be condemned; and C. S., 2792(a) (vol. 3), provides that the powers therein granted cities to improve their streets, drainage, and sewer conditions shall be supplementary to the powers granted in their charters, and in case this section shall be in conflict with the charter, the city may in its discretion proceed in accordance with the charter or with the statute law. In section 2792 it is said that if the parties cannot agree for the purchase of the land condemnation may be made under article 2 in the chapter on Eminent Domain.

All these statutes, the charter and the general law, contemplate negotiations before the institution of any proceeding for condemnation; and

for this reason we should hesitate to say that the "proposal of a peace offering" intended to bring about a preliminary agreement as to the compensation was not made pending the treaty. *Poteat v. Badget,* 20 N. C., 349; *Sutton v. Robeson,* 31 N. C., 381; *Daniel v. Wilkerson,* 35 N. C., 329; *Hughes v. Boone,* 102 N. C., 137; *Montgomery v. Lewis,* 187 N. C., 577.

But we think the decision of this point is at present unnecessary. If it be conceded that the excluded testimony would have disclosed an offer to grant the easement, it would also have shown that the proposed consideration was "not so much money," but "certain work to be done." If it be granted further that it would have disclosed Garrison's estimate of the cost, is not his estimate practically the same as the estimate accredited to him by Boyles? They were debating the cost of putting a concrete top on a ditch, forty or fifty feet in length, extending diagonally across the lot. Boyles would have said Garrison had fixed the cost at not more than $100 or $125. Garrison testified that he had built the two concrete sides and the concrete bottom at a cost of about $300,—each at a cost of about $100. True, this would not necessarily have made the cost of the top of $100, but Garrison said also, "I don't know that the top would cost any more than the bottom or the sides." Garrison's estimate was substantially what Boyles offered to prove; and as there was sufficient evidence to enable the jury to determine the cost of building a top for the ditch and as this cost was the consideration named by Garrison for the easement, we see no prejudicial error in the exclusion of the testimony.

No error.

J. A. JONES CONSTRUCTION COMPANY v. HAMLET ICE COMPANY.

(Filed 25 November, 1925.)

Actions—Second Action on Same Subject-Matter—Motions—Dismissal—Courts—Jurisdiction.

Where an action has been commenced by the issuance of a summons in the Superior Court of a county, an action thereafter commenced in a different county wherein the same or substantially the same subject-matter is involved, between the same parties, will be dismissed when the plaintiff in the second action may obtain adequate relief in the one first brought; or the court, *ex mero motu,* will dismiss the later action for want of jurisdiction.

APPEAL by plaintiff from *Lane, J.,* at May Term, 1925, of MECKLENBURG.

CONSTRUCTION CO. *v.* ICE CO.

Civil action to recover balance alleged to be due under a building contract.

Upon motion of defendant, there was a judgment dismissing the action for that another suit between the same parties, involving substantially the same subject-matter, was pending in another county. Plaintiff appeals.

Stewart, McRae & Bobbitt for plaintiff.
J. W. Bailey and S. Brown Shepherd for defendant.

STACY, C. J. The facts are these: On 23 March, 1925, the Hamlet Ice Company instituted a suit in the Superior Court of Wake County against the J. A. Jones Construction Company, of Charlotte, N. C., and the Maryland Casualty Company, as surety, to recover damages for an alleged breach of a building contract. Summons in the action was served by the sheriff of Mecklenburg County on 24 March, 1925, and the complaint was filed on 8 April, 1925. After the service of summons in the suit just mentioned, and on the following day, 25 March, 1925, the J. A. Jones Construction Company instituted this action in the Superior Court of Mecklenburg County against the Hamlet Ice Company to recover the balance alleged to be due and unpaid under the said building contract. The summons and complaint in this action were served simultaneously by the sheriff of Wake County on 26 March, 1925.

It will be observed that the parties bottom their respective causes of action on the same contract, each alleging a breach by the other. The two causes of action, therefore, arise out of the same subject-matter; and a recovery by one would necessarily be a bar or offset, *pro tanto* at least, to a recovery by the other.

The action instituted by the Hamlet Ice Company in Wake County was pending at the time of the institution of the second suit by the J. A. Jones Construction Company in Mecklenburg County, for it is held in this jurisdiction that an action is pending from the time summons is issued. *Pettigrew v. McCoin,* 165 N. C., 472, 52 L. R. A. (N. S.), 79, and note. Hence, the motion to dismiss the present action was properly allowed. *Allen v. Salley,* 179 N. C., 147.

Speaking to the question in *Alexander v. Norwood,* 118 N. C., 381, *Faircloth, C. J.,* said: "Where an action is instituted, and it appears to the court by plea, answer or demurrer that there is another action pending between the same parties and substantially on the same subject-matter, and that all the material questions and rights can be determined therein, such action will be dismissed. The plaintiff has no election to litigate in the one or bring another action (*Rogers v. Holt,* 62 N. C., 108), and the court will, *ex mero motu,* dismiss the second action, as

the parties, even by consent, cannot give the court jurisdiction. *Long v. Jarratt,* 94 N. C., 443."

To like effect is the language of *Walker, J.,* in *Emry v. Chappell,* 148 N. C., p. 330: "The general principle of the law is that the pendency of a prior suit for the same thing or, as commonly said, for the same cause of action between the same parties in a court of competent jurisdiction will abate a later suit, because the law abhors multiplicity of suits and will not permit a debtor or a defendant to be harassed or oppressed by two actions, if even substantially alike, to recover the same demand, when the plaintiff in the second action can have a complete remedy by one of them. 1 Cyc., 20-21; *Alexander v. Norwood,* 118 N. C., 381; *McNeill v. Currie,* 117 N. C., 341; *Harris v. Johnson,* 65 N. C., 478. The principle is based upon the supposition that, if the first suit is so constituted as to be effective and available, and also to afford an ample remedy to the plaintiff in the second, the latter is unnecessary and should be dismissed. *Smith v. Moore,* 79 N. C., 82. The positions of the respective parties on the record in the two suits, whether plaintiffs or defendants, is not material, if full relief can be had in the one first commenced. *Gray v. R. R.,* 77 N. C., 299; *Wallace v. Robinson,* 41 N. H., 286."

The appeal presents no error, and hence, the judgment of dismissal must be upheld.

Affirmed.

WINSTON BRICK MANUFACTURING COMPANY v. GEORGE D. HODGIN AND EFFIE HODGIN.

(Filed 2 December, 1925.)

1. Statute of Frauds—Deeds and Conveyances—Right of Ways—Easements—Incorporeal Hereditaments.

The granting of a right of way by the owner upon his land is of an easement thereon, an incorporeal hereditament, and is required by the Statute of Frauds to be in writing. C. S., 988.

2. Same—Prescription—Ways of Necessity.

A way of necessity arises from a grant proved or presumed from prescription usually from mere necessity in using the land conveyed or retained by the grantor, in most cases construed to come within the terms of the grant.

3. Same—Parol Evidence.

Where the owner conveys a part of his land without outlet except one designated to a certain public highway, the way so designed will control the vendee's selection, and parol evidence tending to show a different one is incompetent.

BRICK CO. *v.* HODGIN.

APPEAL by defendant from FORSYTH Superior Court. *Lyon, J.*

Action by plaintiff against defendants to recover damages. Judgment for plaintiff. Appeal by defendant. New trial.

The plaintiff alleged that on 2 February, 1923, it contracted, with defendants for the purchase of a tract of land containing 6 acres, which was on said date conveyed to plaintiff by deed in Book 215, p. 27, of Forsyth County, with the following description: "Beginning at an iron stake, Joshua Sills' corner, and runs thence N. 88 degrees 00 W., about 382.7 feet to a stake in the east side of a new 30-foot road; thence with said road S. 0 degrees 45 W. about 578.0 feet to a stake; thence S. 88 degrees 00 E., about 505.7 feet to a stake in Joshua Sills' line; thence N. 5 degrees 30 minutes E., about 90.0 feet to a stone; thence N. 2 degrees 00 E., 222.0 feet to a stone; thence N. 2 degrees 00 E., 266.4 feet to an iron stake, the place of the beginning, and containing 6.0 acres more or less. This property will have a road platted to Walkertown or paved highway."

The plaintiff also alleged that the defendants designated and stipulated a road "a way of necessity" over their own land to the public highway, the same to be used for the benefit of the plaintiff and described as indicated in the deed.

It was also alleged that plaintiffs spent some money in repairs on the road, and that on 15 August, 1923, the defendants closed the road to the injury of plaintiffs, and though demanded, the defendants had not reopened this road, and that plaintiff's brick business was broken up and loss and damage resulted therefrom.

The defendants admitted that they sold the six-acre tract of land to plaintiff, with quoted sentence in deed, and that they had designated and stipulated a road over their own land to the public highway to be used for the benefit of the plaintiff, and described as set out in the deed, and that they provided a roadway and that there still is a roadway to plaintiff's property, and denied all other material allegations.

The jury rendered the following verdict:

"1. What damages, if any, is the plaintiff entitled to recover against the defendant, George D. Hodgin, for obstructing road to the plaintiff's brick plant? Answer: $900.00.

"2. What damages, if any, is the plaintiff entitled to recover against the defendant, Effie Hodgin, for obstructing road to the plaintiff's brick plant? Answer: Nothing."

No counsel for plaintiff.
J. H. Whicker for defendants.

VARSER, J. The pleadings disclose an admitted contract between the defendants and the plaintiff in "that the defendants designated and

stipulated a road, a 'way of necessity' over their own land, to the public highway, the same to be used for the benefit of the plaintiff and described as follows: 'This property will have road platted to Walkertown or paved highway' " and defendants allege that "they provided a roadway and there is still a road to plaintiff's property." Plaintiff's allegation that the defendant closed this "way of necessity" in August, 1923, is denied, and the allegations of damages flowing to the plaintiff are also denied. The issues submitted are not objected to and the verdict has eliminated the *feme* defendant.

The appellant assigns error for that the trial court admitted evidence tending to locate a 30-foot road called for in the deed, beginning "at an iron stake, Joshua Sills' corner"; and stating how this road was closed up and the statement that the plaintiff had no other way out, together with the condition of plaintiff's brick machine at the time the road was closed, and 4 months later, tending to show that 4 months after the closing of the road, the machinery was in bad condition, rusty because it could not be used for lack of a way to approach the mill-site, and that the plaintiff had orders for brick when the road was closed, and in approximating the loss of plaintiff's machinery and tools; in stating that defendant Hodgin told plaintiff he was planning to have the railroad make another crossing and have another road by a man's house on the railroad side, and in declining to allow the defendant to introduce the plat.

The phase of these exceptions necessary to be considered now is the contention that the admission of this evidence tended to prove a contract different from that admitted in the pleadings and described "as a road platted to Walkertown or paved highway." The evidence thus admitted tends to limit the location of the road in controversy to the 30-foot road mentioned in the description when the deed refers "to a stake in the east side of a new 30-foot road"; whereas the road declared upon and admitted, is the road which the "property will have platted to Walkertown or paved highway." The description in calling for the new 30-foot road was using the language for the purpose of description, and the parties have admitted that the road which the parties contracted for is that road referred to as going "to Walkerton or paved highway." The Walkertown highway and "the paved highway" are the same.

A grant of a road is the grant of an easement, an incorporeal hereditament. Minor's Institutes, 2 vol., 18; 2 Blackstone, 35; Cooley's Blackstone, 458; Tiffany on Real Property (2 ed.), 1198-1304, Pars. 348-363; Mordecai's Law Lectures, 466.

An easement is an interest in land, and is, therefore, within the statute of frauds (C. S., 988), and a contract creating the same must be in writing. *Davis v. Robinson,* 189 N. C., 589; *Hall v. Misenheimer,* 137

N. C., 186; *Drake v. Howell,* 133 N. C., 165; *Presnell v. Garrison,* 121 N. C., 366; *Buckner v. Anderson,* 111 N. C., 577; *Herndon v. R. R.,* 161 N. C., 650; *Kivett v. McKeithan,* 90 N. C., 106; *McCracken v. McCracken,* 88 N. C., 272; *Reise v. Enos* (Wis.), 8 L. R. A., 617; *North Beach & M. R. Co.'s App.,* 32 Cal., 506; *Foster v. Browning,* 4 R. I., 51; *Rice v. Roberts,* 24 Wis., 465; *Cayuga R. R. Co. v. Niles,* 13 Hun., 173; *Day v. N. Y. Central R. R. Co.,* 31 Barb., 548. Such easements are within the statute of frauds and cannot be proved by parol. *Davis v. Robinson, supra; Ham v. Massasoit Real Est. Co.,* (R. I.), 107 Atl., 205; *Wagner v. Hanna,* 38 Cal., 111, 99 Am. Dec., 354.

However, a "way of necessity" arises from the grant which is proved or presumed from prescription (*Cagle v. Parker,* 97 N. C., 271), usually from mere necessity in using the property conveyed or retained. Therefore, it arises in most cases, by implication, but such implication puts into the terms employed in the grant this way of necessity. *Norfleet v. Cromwell,* 64 N. C., 12.

However, the parties stipulated for a "way of necessity" to the Walkertown highway, their rights thus established are the same as when "a way of necessity" to the designated highway had been established *in invitum.* It is the right of plaintiff to pass over defendant's lands, owned by him 2 February, 1923 (the date of the deed), to the Walkertown highway. The vendor selects the way and if he fails to select, the vendee may select. This way is one of necessity, and therefore, not one of convenience. Mordecai's Law Lectures, 466; *Corea v. Higurea,* 17 L. R. A. (N. S.), 1018, with an elaborate note of authorities and principles; Minor's Institutes, *supra;* Tiffany on Real Property, *supra;* Blackstone, *supra.*

A learned decision of ways of necessity appears in *Lumber Co. v. Cedar Works,* 158 N. C., 161. The principles of the foregoing apply to the case at bar with the modification arising from the admission of the creation of the way of necessity in the deed sued on.

Therefore, it was error to admit evidence tending to locate the road in controversy, except as contemplated in the terms, "a road platted to the Walkertown or paved highway." Of necessity such a road may be located, according to the evidence, in more than one place, and the contract for such a road would be satisfied when the necessity, and not the convenience, is met.

The evidence challenged by the exceptions does not conform to the principles applicable, hence there was error.

The other questions may not present themselves in another trial, hence they are not discussed.

The judgment entered is reversed to the end that there shall be, in accordance with the principles herein announced, a

New trial.

HOWARD PATTON, BY HIS NEXT FRIEND, D. L. PATTON, v. HEATH BROTHERS.

(Filed 2 December, 1925.)

Contracts—Sales—Actions—Title — Claim and Delivery—Gifts—Consideration.

Where an automobile was advertised to be given at an auction sale of lots of land to one present at the beginning and conclusion of the sale of all the lots, as an attraction to obtain bidders, by a drawing of names written upon cards, etc.: *Held*, in an action by one claiming the automobile as having complied with these conditions, it was necessary to his recovery that he show by the greater weight of the evidence that a delivery of the automobile, actual or constructive had been made to him in order that the title had vested in him, whether the transaction be regarded as being upon consideration or a gift.

APPEAL by defendants from judgment of the GUILFORD Superior Court, March Term, 1925, *McElroy, J.* New trial.

Action to recover possession of an automobile. Plaintiff alleges that he is the owner of said automobile, and that defendants wrongfully detain same in their possession. At the time of the institution of the action, plaintiff filed the affidavit and undertaking as provided by statute, and procured the issuance of a writ of claim and delivery. Pursuant to said writ, the sheriff of Guilford County seized and took from defendants the automobile described in the affidavit; thereafter, defendants having executed and filed with the sheriff the undertaking required by statute, the said automobile was returned to defendants.

The issues submitted to the jury, with answers thereto, are as follows:

"1. Is the plaintiff the owner and entitled to the possession of the car described in the pleadings? Answer: Yes.

"2. What was the fair market value of said car at the time of the taking under claim and delivery in this action? Answer: $326.25, without interest."

From judgment upon the verdict, defendants appealed.

G. M. Patton and R. C. Strudwick for plaintiff.
Andrew Joyner, Jr., and E. D. Kuykendall for defendants.

CONNOR, J. On 6 October, 1923, defendants conducted an auction sale of lots, located near the town of Gibsonville, N. C. Prior to said date, they had advertised that said sale would be held, and had thereby sought to procure the attendance of a large number of persons at said sale. Advertisements were made by means of printed circulars, generally distributed throughout the surrounding country. The following statements were made in said circulars:

"Come out as our guest, whether you buy or not. Take a chance at the new Ford to be given away absolutely free. All you have to do is to be on the ground when the sale starts, and stay there until the sale closes. We guarantee a square deal to every one."

"Saturday, October 6, 1923, 2 p. m. Stay there until after the sale, and this will entitle you to a free chance at the Ford car to be given away at the close of the sale."

Plaintiff, a child of three years of age, was taken to the sale by his parents; prior to the commencement of the sale, cards were distributed among those present, with the announcement by defendants that each person present, who desired to enter the contest for the automobile, should write his name upon a card, and return same to the auctioneer; that at the close of the sale, all the cards would be put in a box and that the automobile would be given to the person whose name was written on the first card drawn therefrom.

Plaintiff's evidence tended to show that the only additional requirement was that contained in the advertisements, to wit, that such person should be on the grounds when the sale started, and stay there until the sale closed; defendants' evidence tended to show that in addition to this requirement, it was announced before the sale began, that unless such person, whose name was first drawn, was present on the last lot sold, at the time of the drawing, and answered to his name, his rights would be forfeited, and second drawing would be conducted; that this would be continued until the prize was properly awarded.

Plaintiff's name was written on a card by his sister, and this card was delivered to the auctioneer; during the progress of the sale, plaintiff was taken by his mother to his father's automobile, at a distance of one hundred and fifty to two hundred yards from the last lot sold, where he fell asleep; when the sale closed, the drawing was held on the last lot sold. Plaintiff's name was on the first card drawn.

Plaintiff's evidence tends to show that when it was announced that his name appeared upon the first card drawn, his father, D. L. Patton, answered in his behalf, and that a friend said that he would bring plaintiff from the automobile, where he was sleeping, to the lot in a few minutes; that this friend went at once for plaintiff, and in a few minutes after his name had been called he was brought into the presence of those who had conducted the drawing, when the claim was made in his behalf, by his father, that he was entitled to the automobile. Defendants' evidence tended to show that when the card on which plaintiff's name was written was drawn, announcement of that fact was made, and that his name was called six or more times, with no response; that thereupon those in charge of the drawing announced that plaintiff not being present, had, under the rules, forfeited all his rights to the automobile, and pro-

ceeded to draw another card; that thereupon the father of plaintiff, insisted that his son had won the automobile, and forcibly prevented a second drawing by scattering the cards about on the ground; that the automobile was subsequently sold and the proceeds distributed among the churches of the town of Gibsonville.

The court charged the jury as follows: "Now, gentlemen of the jury, the court submits the following issues for your consideration:

First. Is the plaintiff the owner and entitled to the possession of the car described in the pleadings? The burden of that issue is upon the plaintiff to satisfy you by the greater weight of the evidence that he is the owner and entitled to the possession of the car in question.

The court charges you, gentlemen of the jury, that if the plaintiff has satisfied you by the greater weight of the evidence that he was there when the sale started and deposited a card in the box with his name on it, or if it was deposited in the box for him by his sister, that he remained on the grounds during the sale and until it was over, and that at the time the drawing took place he was in his father's car on the grounds, within a distance of from 150 to 200 yards from the place where the car was being given away, and if you further find from the evidence, and by the greater weight, that the plaintiff's name was first drawn from the box, and that his name was called one or more times and that his father answered for him and stated, 'That is my son,' and if you further find from the evidence that after his father had answered, he stated to the defendants, or one of them, 'My son is over in the car and will be here in a minute, over there in the car at the place where the sale commenced, and will be here in a minute,' and that he at once sent Ridge after him, or that Ridge went after him, and returned with the boy in two or three minutes and notified defendants that 'Here is the boy'; if the plaintiff has satisfied you by the greater weight of the evidence of these facts, then, gentlemen of the jury, the court charges you that he would be the owner of the car in question, and entitled to the possession thereof, and it would be your duty to answer the first issue, 'Yes'; on the other hand, if the plaintiff has failed to satisfy you by the greater weight of the evidence of these facts, it would be your duty to answer the first issue, 'No.'"

Defendants excepted to this instruction and assigned same as error.

Plaintiff contends that he derived title to the automobile from defendants. To sustain this contention he must rely upon either a sale or a gift of the automobile to him by defendants. The instruction challenged by defendants' exception does not submit to the jury the question as to whether or not there had been a delivery of the automobile to plaintiff by defendants. An affirmative answer to the first issue is not predicated upon the finding by the jury as a fact that the automobile had

been thus delivered, either as the consequence of an executed contract, resulting in a sale, or of a gift. Delivery, either actual or constructive, is essential to the vesting of title to a chattel, as a result of either a sale or a gift. Plaintiff does not seek, in this action, to recover damages for the breach of a contract, but seeks to recover possession of the automobile, upon his allegation of ownership.

A sale is defined by Blackstone, Book II, chap. 30, p. 446, as "a transmutation of property from one man to another in consideration of some price or recompense of value." A contract of sale is not complete, so as to vest title to the subject-matter, until the consideration has been paid, or until delivery has been made by the vendor to the vendee. Black's Law Dict., p. 1053.

A gift defined by Blackstone, Book II, chap. 30, p. 440, as a "voluntary transfer of goods from one person to another, made gratuitously, and not upon any consideration." Delivery is an indispensable requisite to a gift. "To constitute a valid gift, *inter vivos,* there must be an intention to give and a delivery to the donee or to some one for him, of the property given. An intention of the donor to give is not alone sufficient. The intention must be executed by a complete and unconditional delivery. Neither will a delivery be sufficient, unless made with an intention to give. The transaction must show a completely executed transfer to the donee of the present right of property and possession." *Harris Banking Co. v. Miller,* 1 L. R. A. (N. S.) 790; *Thomas v. Houston,* 181 N. C., 91.

The assignment of error based upon the exception to the instruction to the jury, must be sustained.

An affirmative answer to the first issue cannot be sustained without a finding by the jury, from competent evidence and under proper instructions, that the automobile had been actually or constructively delivered by defendants to plaintiff. This is true whether the transaction was a sale, resulting from a valid contract, or a gift. No title passed from defendants to plaintiff, unless there was a delivery. The delivery may be actual or constructive. *Gross v. Smith,* 132 N. C., 604; *Newman v. Bost,* 122 N. C., 524; *Adams v. Hayes,* 24 N. C., 361.

The question as to whether the transaction was a sale, as contended by plaintiff, or a gift, as contended by defendants, or as to whether there was evidence from which the jury could find that there was a delivery, are not presented upon this appeal. For the error in failing to submit to the jury, in the instruction excepted to, the question as to whether there had been a delivery of the automobile, there must be a

New trial.

MARY C. COLEMAN v. E. T. McCULLOUGH.

(Filed 2 December, 1925.)

1. Reference—Remanding Cause—Hearings.

Where the trial judge in passing upon the report of the referee to hear evidence, finds the facts therefrom, and reports them with his conclusions of law, sustains it only in part, and refers the case to the same referee "to find facts and state conclusions of law upon the issues," etc., the order of remand was for the purpose and comprehended only a revision of his findings and conclusions upon the evidence already taken before him.

2. Same—Evidence—Notice to Parties.

Where a case has been remanded to the referee for his findings and conclusions upon the evidence already taken before him without objection, and a party had made no request for a further hearing or the introduction of further evidence, upon a restatement by the referee of his report, it is not requisite that the referee give him notice.

3. Same—Cumulative Evidence—Discretion of Court.

The further report of a referee after the case has been remanded and approved by the trial judge, will not be disturbed on appeal to the Supreme Court for the mere failure to receive cumulative evidence, as this is addressed to the sound discretion of the trial judge.

4. Same—Procedure—Filing Report—Laches.

Where the cause is referred to a referee, a party thereto is affected with notice of the various steps taken during the progress of the trial, including the filing of the report of the referee, and his failure on this account to file his exceptions in apt time will not excuse his laches in so doing.

5. Same—Findings—Exclusion of Evidence.

A case will not be remanded to a referee upon the ground that evidence should have been taken on the question as to the measure of damages in the movant's favor for breach of contract, when the referee has found, upon sufficient evidence, that the opposing party had not breached it, and this finding had been approved by the trial judge.

6. Reference—Orders.

It is suggested that the trial judge in remanding a case to a referee, point out the special purpose of the recommittal, in order to avoid confusion or controversy therein.

STACY, C. J., dissenting.

APPEAL by plaintiff from *Schenck, J.*, at March Term, 1925, of FORSYTH.

On 20 May, 1922, the plaintiff and the defendant entered into a written agreement by the terms of which the defendant was to build for the plaintiff at a stipulated price certain houses on lots owned by the plaintiff. In the complaint it was alleged that the defendant had failed to comply with his contract, had locked the houses, and had refused to do

any other work or to permit the plaintiff to take possession of the property, whereby she had suffered loss. The defendant denied the material allegations of the complaint and alleged that he had performed his contract and that the plaintiff had paid only $400 on the contract price of $2952.50, leaving due him $2552.50; also that he had sustained other loss by reason of the plaintiff's breach of contract.

The following facts appear in the record: (1) At the February Term, 1924, of the Superior Court, Judge Bryson referred the cause to H. M. Ratcliffe, as referee, instructing him "to hear the evidence and arguments in the case, find his statement of facts and conclusions of law, and to report to the Superior Court." (2) In the months of February and March, 1924, the referee by consent of counsel heard the testimony of some twenty-five witnesses, and (argument having been waived by counsel) thereafter prepared his report, which was filed 11 August, 1924. (3) On 26 August, 1924, the plaintiff filed exceptions, and at the November Term, 1924, Judge McElroy affirmed the first four findings of fact and set aside findings 5 to 10 inclusive and the first and second conclusions of law, and thereupon remanded the cause to the referee "to find facts and state conclusions of law upon the issues that arise upon the pleadings and report his findings of fact and conclusion of law." (4) The plaintiff excepted to the court's approval of the third and fourth findings of fact, but not to the order remanding the cause. (5) The referee's second report which was dated 5 December, 1924, and filed 8 December, again recited the waiver of argument. In formulating this report the referee did not give notice to either party of a further hearing; and neither party made a request to be heard or to introduce additional evidence. (6) The plaintiff did not have actual notice of the filing of this report until 23 January, 1925; and between 8 December, 1924, and 23 January, 1925, two terms of the Superior Court were held. (7) On 7 February, 1925, a motion to remand the cause to the referee was filed, and at the March Term, 1925, it was heard by Judge Schenck and denied. The plaintiff then asked leave or moved to file exceptions to the report and his request or motion was refused. Judgment was rendered in favor of the defendant for $2390.75, the amount sued for $2552.50, less deductions for minor repairs made by the plaintiff. The plaintiff excepted and appealed.

Swink, Clement & Hutchins for plaintiff.
Raymond G. Parker and W. L. Morris for defendant.

ADAMS, J. The plaintiff rests her appeal upon two contentions: (1) That under Judge McElroy's order remanding the cause she had a legal right to be heard and to introduce evidence before the referee, and that

having been denied this privilege she had a legal right either to a reference or to a reasonable time for filing exceptions. (2) That she was entitled to a rereference or to an opportunity for filing exceptions on the ground of excusable neglect or surprise under C. S., 600. It appears, then, that the plaintiff's exceptions depend primarily, if not exclusively, upon the purpose and effect of Judge McElroy's order; and such purpose and effect can be determined only by reference to the context and the attendant facts.

It is to be observed in the first place that Judge Bryson appointed a referee to take the evidence, hear the argument, find the facts, and state his conclusions of law. This order, to which there was no exception, referred the cause for trial and not for the mere statement of an account as a step preparatory to a trial in term. *Barrett v. Henry,* 85 N. C., 322; C. S., 572 *et seq.* The evidence was taken, the argument was waived, and the report was filed in the Superior Court. The principal issue was whether the defendant had built the houses in compliance with his contract. In the fifth paragraph of his findings of fact the referee pointed out his personal examination of the houses, made at the suggestion of counsel on both sides, and deduced his finding not only from the evidence, but from his personal observation; and in the sixth paragraph he suggested that by taking the testimony of designated witnesses the court would no doubt concur in his finding. It would seem, then, that Judge McElroy's instruction that the referee should find the facts and state the law upon the issues raised by the pleading, is reasonably susceptible of only one construction, namely, that the referee, disregarding his personal observation of the houses and relying upon the entire evidence, not particularly upon the testimony of certain witnesses, should pass upon the specific issues and find whether either party had failed to abide by the terms of the written agreement. Manifestly the taking of additional evidence was not within the purview of the order; only a revision of the findings upon the evidence already taken. The object was a more definite report, not another trial before the referee. The argument of counsel had been waived and the plaintiff made no request of the referee to be heard before the second report was filed. Upon the mere restatement of his report the referee was not required to give notice to the parties. *Gay v. Grant,* 116 N. C., 93; *Winstead v. Hearne,* 173 N. C., 606.

There is another point: the plaintiff in effect admits in her brief that the proposed evidence, if admitted, would have been cumulative; and under the circumstances disclosed by the record we are satisfied the report should not be set aside for the introduction of evidence of this character. We find nothing in the record which prevented the operation

of the general rule and the consequent exercise by the judge of his sound discretion in refusing to recommit the cause for the admission of cumulative evidence.

Nor was the referee required to notify the parties that the report had been filed; their cause was pending and as they had no right to reopen the case for the introduction of cumulative evidence and as the argument had been waived, in contemplation of law they were affected with notice of the various steps that were taken during the progress of the trial, including of course the filing of the report. *Blue v. Blue,* 79 N. C., 69; *University v. Lassiter,* 83 N. C., 38; *Dempsey v. Rhodes,* 93 N. C., 120; *Williams v. Whiting,* 94 N. C., 481; *Coor v. Smith,* 107 N. C., 430; *Reynolds v. Machine Co.,* 153 N. C., 342; *Barger v. Alley,* 167 N. C., 362.

In *S. v. Peebles,* 67 N. C., 97, the Court said: "It is the well-settled rule that exceptions to such reports must be made, as a matter of right, at the court to which the report is made, and after that it is a matter of discretion with the court whether such exceptions shall be allowed or not." *Green v. Castlebury,* 70 N. C., 20; *University v. Lassiter, supra; Commissioners v. Magnin,* 85 N. C., 115; *Long v. Logan,* 86 N. C., 535; *Mfg. Co. v. Williamson,* 100 N. C., 83; *McNeill v. Hodges,* 105 N. C., 52. The plaintiff took no action with reference to the report until two terms of the Superior Court had elapsed and thereby lost her opportunity to file exceptions as a matter of right.

The plaintiff's motion to remand the cause was not meritorious. It was based upon the affidavit of John Coleman, the plaintiff's husband, in which it was alleged that the plaintiff had been denied the right to introduce evidence tending to show the difference in value between the houses as built and as contemplated by the contract. The answer to this position is obvious. Apart from the question of its cumulative character the proposed evidence would have been competent only in case of the defendant's failure to comply with his contract. But the referee found as a fact that there had been a substantial compliance with the defendant's contract, and this finding was affirmed by the judge. There was no occasion for applying the measure of damages set up in the affidavit.

As to the second contention only this need be said: if, without deciding the point, we assume that section 600 may be invoked in this kind of proceeding, still, as the plaintiff was charged with notice of each step in the progress of the cause, her failure to file exceptions to the report was not the result of surprise or excusable neglect within the meaning of the statute.

It may not be inappropriate to suggest that when a cause is remanded to a referee, controversy may be prevented by an order pointing out the

special purpose of the recommittal—whether to take additional evidence, or to make additional findings of fact on the evidence taken, or simply to revise the report. When this is done neither the referee nor the parties need have cause for a difference of opinion as to the scope of the further proceeding. The judgment is

Affirmed.

STACY, C. J., dissenting: I regret to disagree with my brethren on a question of procedure, but our difference in the present case is fundamental and goes to the basic right of every litigant to be heard. *Markham v. Carver,* 188 N. C., 615.

It will be observed that Judge McElroy adopted the first four findings of fact, as originally made by the referee, set aside the last six, together with the referee's first two conclusions of law, and then remanded the cause to the referee "to find facts and state conclusions of law upon the issues that arise upon the pleadings and report his findings of fact and conclusions of law to the Superior Court."

It is held by the court that this order did not contemplate the hearing of additional evidence by the referee, but that its only purpose was to have the referee revise his findings upon the evidence already taken and make his report more definite. I do not so understand the order. If this be its meaning, why was the matter sent back to the referee at all? The evidence previously taken by the referee accompanied his report and was then before the judge of the Superior Court who was authorized, in the exercise of his supervisory power, to amend, modify, set aside, make additional findings and confirm, in whole or in part, or disaffirm the report of the referee. C. S., 579; *Vaughan v. Lewellyn,* 94 N. C., 474; *S. v. Jackson,* 183 N. C., 695. The judge adopted some of the findings originally made by the referee and set aside others. His order certainly contemplated another hearing before the Superior Court upon the final report of the referee, and this would have been a useless consumption of time if it was to be made only on the evidence already taken and then before the court. Why have another hearing upon the same evidence when both the referee and the judge had already heard the case on that evidence? Why did Judge McElroy not proceed to judgment immediately upon the evidence then before the court?

The two reports of the referee are almost identical. The amount awarded the defendant is the same in both reports. On exceptions filed to the first report, six of the referee's findings were set aside. These, it seems to me, have been reinstated and confirmed without adequate opportunity on the part of the plaintiff to be heard, either before the referee or the judge of the Superior Court. The fact that they were set aside in the first instance would indicate serious dispute as to their

correctness, but it appears that plaintiff won on her exceptions first filed, only to lose later without further opportunity to be heard.

Possibly the plaintiff deserves to lose on the merits of her case; but as a matter of procedure, she is entitled to a fair opportunity to be heard and she ought to be made to feel, as every litigant should rightly feel, that she has had a fair chance to present her case. A majority of the Court considers that this has been done in the instant suit. I think otherwise; and from this difference, springs our divergence of opinion.

I. C. DAMERON AND R. C. ORMAND v. CARL G. CARPENTER AND C. W. FULLER.

(Filed 2 December, 1925.)

1. Equity—Subrogation—Mortgages—Purchasers.

Equity subrogates the purchaser from the mortgagor of lands holding the equity of redemption to the rights of the mortgagor to clear the title, by payment of the mortgage debt and to procure the legal estate to the mortgaged premises.

2. Same—Courts—Jurisdiction.

Under our statutory procedure, wherein law and equity are administered in the same tribunal, there is no distinction between legal and equitable set offs where these principles are enforcible.

3. Equity—Set-Offs.

A set-off is in the nature of a payment or credit when there are mutual debts existing between the parties.

4. Same—Mortgages.

In the case of set-offs, the payment of a debt thereby applies equally to a debt secured by mortgage and to unsecured debts in proper instances.

5. Same—Title—Actions—Suits.

The plaintiff was the purchaser of lands subject to mortgage, and also the owner of an unsecured note of the mortgagor, who after the plaintiff had demanded his right to set off, transferred the note for value after maturity and the plaintiff sought to enjoin the foreclosure sale of the mortgaged premises: *Held*, the defendant was a purchaser of the mortgage note with notice after demand, and the plaintiff was entitled to the set-off and thus to clear the title to the *locus in quo*.

6. Appeal and Error—Record—Courts—Findings of Fact.

Where the court in finding certain facts in the case on appeal makes such findings as are clearly contradictory to the judgment set out in the record, the findings will be disregarded, and the Supreme Court will construe the record to ascertain the actual facts when such clearly appear therefrom.

DAMERON *v.* CARPENTER.

APPEAL by plaintiffs from GASTON Superior Court. *Stack, J.*, and *Winston, Special J.*

Consolidated action to restrain a sale under mortgage and to cancel mortgage indebtedness. From a judgment declining to continue the restraining order to the final hearing the plantiffs appeal. Error.

Two actions were instituted, one *"I. C. Dameron and R. C. Ormand v. Carl G. Carpenter"* to restrain a sale of certain lands in Bessemer City, under mortgage executed by Lizzie McLean and Lee McLean to C. W. Fuller, dated 23 October, 1922, which are owned by plaintiffs by virtue of a purchase, subject to such mortgage. The other: *"I. C. Dameron and R. C. Ormand v. C. W. Fuller"* was for the purpose of applying a debt due to plaintiffs by C. W. Fuller on an unsecured note as a payment of the mortgage note. The consolidation was either at or before December Term, 1924. At this term certain proceedings were had before his Honor, A. M. Stack, J., as are shown in the judgment of Winston, J., at June Special Term, 1925, as follows:

"The above entitled causes came on to be heard at the December Term, 1924, of Gaston County Superior Court, before his Honor, A. M. Stack, judge presiding, and said causes having been consolidated, the following facts were found by the court, by consent of the several parties:

"1. That the defendant, C. W. Fuller, is indebted to the plaintiffs, on a promissory note under seal, dated 15 August, 1916, in the principal sum of $734.40 with interest on said sum to date.

"2. That the defendant, Carl G. Carpenter, is the owner of a certain note and mortgage deed executed by Lizzie McLean and Lee McLean, her husband, to defendant, C. W. Fuller, under date of 23 October, 1922, and due and payable 23 October, 1923.

"3. That defendant, C. W. Fuller, assigned said note and mortgage to defendant, Carl G. Carpenter, in writing, under date of 28 June, 1924.

"4. That the plaintiffs, I. C. Dameron and R. C. Ormand are the owners in fee of the lands described in said mortgage deed, subject to the encumbrance existing by virtue of said mortgage deed.

"Under the facts found as above, it is agreed by counsel that the judgment was announced as follows:

"It is ordered and adjudged that the plaintiffs do have and recover from the defendant C. W. Fuller, the sum of $734.40, with interest thereon from 15 August, 1916, together with the costs of the action first entitled above: It is further ordered and adjudged that the order heretofore issued, restraining the defendant, Carl G. Carpenter, from advertising and selling the lands described in said mortgage deed, be vacated and the plaintiffs taxed with the costs of the second action above entitled.

"Plaintiffs excepted to the judgment of the court and gave notice of appeal to the Supreme Court. Appeal bond was fixed at $50.00, and supersedeas bond fixed at $500.

"It appearing to the court by admission of counsel for all the parties in said actions, that the proceedings as above stated were had and judgment announced as above recited, but that said judgment, if signed, was misplaced and cannot be found, and that the record of the clerk for said December Term, 1924, does not show the proceedings in relation to said actions:

"It is now, by consent of counsel for the parties in said actions, ordered and adjudged that the judgment, as above recited, be entered, reserving to the plaintiffs the right to perfect their appeal to the Supreme Court for hearing at the next term of said Court, but not later."

From the judgment of Stack, J., as thus established the plaintiffs appealed.

Whitney & Kiser and George W. Wilson for plaintiffs.
S. J. Durham for defendants.

VARSER, J. In addition to the facts in this judgment it appears from the affidavit and complaint of the plaintiffs and the answer thereto by defendants, Carpenter and Fuller, that Carpenter does not deny, and Fuller admits, that 28 June, 1924, and prior to his assignment of the McLean mortgage to Carpenter, that plaintiffs offered to pay the mortgage indebtedness to Fuller by offering to credit on the Fuller note held by plaintiffs the amount of the McLean note, and Fuller refused to accept this obligation in payment. The alleged reason for such refusal is that the McLean note was in fact the property of a bank.

For the purpose of discharging the lands described in the mortgage, now owned by plaintiffs, upon these facts, the plaintiffs are entitled to have the McLean note and mortgage canceled. There is a mutuality of indebtedness *quoad* the land mortgaged. The plaintiffs, purchasers, are entitled to all the rights, titles and equities of their grantor, McLean, including the right to pay off the indebtedness according to the terms of the mortgage, and thereby clear their title. *Baker v. Bishop Hill Colony,* 45 Ill., 264; *Schoffner v. Fogleman,* 60 N. C., 564. Equity subrogates the purchaser of the equity redemption to the rights of the mortgagor to clear the title and procure the legal estate only as to the mortgaged premises, and no further. This is sufficient to permit him to set off debts due him by the mortgagee against the mortgage debt. *Harrison v. Bray,* 92 N. C., 488. There is no practical pertinency in the distinction between legal and equitable set-offs in the case at bar, since

both law and equity are administered in the same Court. *Shoffner v. Fogleman, supra.*

A set-off is in the nature of a payment or credit when the debts are mutual. *Battle v. Thompson,* 65 N. C., 406; *Lindsay v. King,* 23 N. C., 401; *Worth v. Fentress,* 12 N. C., 419. Set-off exists in mutual debts, independent of the statute of set-off. Its flexible character is used in equity to prevent injustice. *Bank v. Armstrong,* 15 N. C., 519; *Jones v. Gilreath,* 28 N. C., 339; *Walton v. McKesson,* 64 N. C., 154; *Hodgin v. Bank,* 124 N. C., 542; *Hodgin v. Bank,* 125 N. C., 508; *Fertilizer Co. v. Lane,* 173 N. C., 184; *Moore v. Trust Co.,* 178 N. C., 128.

In *Cavendish v. Geaves,* 24 Beav., 163, 53 English Rep., 319, *Sir John Romilly* sets out the doctrine of set-off in assignable choses in action, with always the requirement of notice to the debtor in the chose assigned so as to complete the right of set-off. That exists in the case at bar. The assignment to Carpenter followed on the heels of the demand by plaintiffs to set off and cancel the McLean note. Carpenter knew nothing of this demand, and had no actual knowledge of plaintiffs' equity, but he took, *after* the demand, a *past*-due note, and, therefore, his taking is subject to all the equities in favor of plaintiffs.

The fact that the Fuller-McLean note is secured, makes no difference. When the debt is paid the security fails. The security lives no longer than the debt which gives it life. *Poston v. Rose,* 87 N. C., 279; *Lumber Co. v. McPherson,* 133 N. C., 290; *Stephens v. Turlington,* 186 N. C., 191; *Porter v. Millett,* 9 Mass., 101.

The record contains what purports to be a verdict in the case of *Dameron and Ormand v. Fuller,* finding that the defendant is indebted to the plaintiffs in the sum of $734.40 with interest from 15 August, 1917, and that the plaintiffs did not have the right to pay off the mortgage on these lots by crediting same on the Fuller unsecured note, and that the assignee of the McLean note acquired title to the mortgage and note under the assignment 28 June, 1924. This verdict is recited to be in the one case against Fuller, while the judgment appealed from is in the consolidated cause. We cannot reconcile the verdict with the findings by consent in the judgment rendered by Stack, J. Evidently the parties superseded the findings of the jury in the one case with the consolidation and the findings of facts by Stack, J.

The record is not satisfactory, and we have interpreted the record in the only way appearing to us.

In vacating the injunction against a sale under the McLean mortgage and in a denial of plaintiffs' right to credit the McLean note on the Fuller note and thereby pay off the same there was

Error.

JENNIE LENOIR COOK v. T. F. BAILEY.

(Filed 2 December, 1925.)

1. **Courts — Appeal from County Court to Superior Court — Statutes— Judgments—Motions—Appeal and Error.**

   Where the statute provides for an appeal from the county court to the Superior Court for errors assigned in matters of law, in the same manner and under the same requirements as are provided by law for appeals from the Superior to the Supreme Court, etc., upon the refusal of the county court judge to set aside a judgment of his court for surprise or excusable neglect, the Superior Court is without jurisdiction to find additional facts as to a meritorious defense in this case, and thereon grant the relief prayed for in the motion.

2. **Appeal and Error—County Court—Superior Court—Supreme Court.**

   Appeals from a statutory county court must be taken intermediately to the Superior Court, from which the appeal then lies to the Supreme Court.

3. **Appeal and Error—Inferior Court—Superior Court—Statutes—Trials.**

   Upon an appeal from the statutory county court to the Superior Court, on refusal of a motion to set aside a judgment for excusable neglect, etc., the trial is not *de novo* in the latter court.

APPEAL by plaintiff from *Finley, J.,* September Term, 1925, FORSYTH. Reversed.

This was an action for damages brought by plaintiff against the defendant. Summons was issued on 11 February, 1924, and duly served. Complaint filed 10 April, 1924, defendant filed answer 23 July, 1924, denying material allegations of the complaint. Defendant employed an attorney, resident of Davie County, N. C., who filed the answer representing him. Defendant is a resident of Davie County. Plaintiff obtained a judgment against the defendant in the county court of Forsyth County on 8 April, 1925. Neither the defendant nor his attorney was present at the trial. A motion made by another attorney is as follows: "The defendant, T. F. Bailey, hereby moves the court to relieve him from the judgment rendered in the above styled matter during the term of the Forsyth County Court commencing on 6 April, 1925, for mistake, surprise and excusable neglect, as provided for by C. S., 600." This motion was heard by Raymond G. Parker, judge presiding, of the Forsyth County Court, on 2 and 18 May, 1925. Numerous affidavits were filed by plaintiff and defendant, as will appear from the record. The judge of the county court found the facts. Among the facts found was: That because "attorney for defendant could not be present at the trial on account of other business engagement on 6 April, 1925, when case was calendared for trial, it was continued until Wednesday, 8 April, 1925, when it was

tried in the absence of defendant and his counsel." Part of other facts found: "Complaint was filed 10 April, 1924, and answer filed 23 July, 1924, denying the material allegations of the complaint, which shows a meritorious defense. . . . That the defendant, about the middle of the week prior to the week of 6 April, 1925, inquired of his attorney . . . of Mocksville, Davie County, the status of his case, and that his attorney stated that he had received a letter from the attorney for the plaintiff, stating that a calendar would be made out on 6 April, and that he would find out the date when it would be tried, and would notify defendant. That . . . attorney for the defendant, did not notify defendant that the case was on the calendar for trial. That this case had been on regular calendar for several terms prior to the April 6th Term, 1925, and had been continued at the request of the defendant. That the defendant never employed any attorney in this case except . . . a practicing attorney of Mocksville, Davie County, N. C., and did not employ any attorney regularly practicing in Forsyth County. Wherefore, upon the foregoing facts, the court holds that there is no mistake, surprise or excusable neglect which would warrant the setting aside of the judgment heretofore rendered and the motion to set aside and vacate the judgment is denied."

Defendant appealed from this judgment to the Superior Court of Forsyth County. The case was heard before Hon. T. B. Finley, judge presiding, who found additional facts to those found by the judge of the county court and among these additional facts is the following: "That the defendant has a meritorious defense to this action." Judge Finley, after setting forth the additional facts found, rendered the following judgment: "It is therefore ordered, adjudged and decreed that the judgment of Forsyth County Court rendered in this cause for $600 at the April Term, 1925, of Forsyth County Court, be and the same is hereby set aside, and the judgment rendered in this cause refusing to set aside the said judgment for $600, be and the same is hereby set aside, and the defendant is given a new trial."

Plaintiff excepted to the judgment, etc., assigned error and appealed to the Supreme Court.

Horace M. DuBose and Jno. C. Wallace for plaintiff.
Swink, Clement & Hutchins and Archie Ellege for defendant.

CLARKSON, J. Section 6(a), Public-Local Laws 1915, chap. 520, establishing "Forsyth County Court" is as follows: "That appeals may be taken by either the plaintiff or the defendant from the Forsyth County Court to the Superior Court of Forsyth County in term-time for errors assigned in matters of law in the same manner and under the same

requirements as are now provided by law for appeals from the Superior Court to the Supreme Court, with the exception that the record may be typewritten instead of printed and only one copy thereof shall be required; that the time for taking and perfecting appeals shall be counted from the end of the term; that upon appeals from the Forsyth County Court the Superior Court may either affirm, modify and affirm the judgment of Forsyth County Court, or remand the cause to the county court for a new trial."

It will be noted that the appeal from the Forsyth County Court to the Superior Court is for "errors assigned in matters of law in the same manner and under the same requirements as are now provided by law for appeals from the Superior Court to the Supreme Court." Appeals must be taken from an inferior court to the Superior Court and thence to the Supreme Court. *Rhyne v. Lipscombe,* 122 N. C., 650; *S. v. Lytle,* 138 N. C., 741; *Oil Co. v. Grocery Co.,* 169 N. C., 523; *Hosiery Mills v. R. R.,* 174 N. C., 453; *Sewing Machine Co. v. Burger,* 181 N. C., 241; *Thompson v. Dillingham,* 183 N. C., 568.

In *S. v. Thompson,* 83 N. C., p. 596, the question presented to the Court, from an appeal from the inferior court of Chatham County to the Superior Court of said county, was "whether a defendant who had been tried and convicted by a jury in the inferior court, upon his appeal to the Superior Court has a right to a trial by a jury *de novo* in that court," *Ashe, J.,* said, the "question has been decided at this term in the case of *S. v. Ham, ante,* 590, where it was held that on an appeal from the inferior to the Superior Court from a judgment rendered in the former court upon a verdict of guilty, the defendant had no right to a trial *de novo,* upon the facts of his case, in the latter court, but only to have his case reviewed upon any decision in the inferior court on any matter of law or legal inference that may have arisen on his trial in that court, in the same manner and under the same restrictions provided now by law for appeals from the Superior to the Supreme Court of the State." In the *Ham case, supra,* the statute of the inferior court, in reference to appeals to the Superior Court, was practically the same as the one here in the Forsyth County Court. *S. v. Hinson,* 123 N. C., p. 755.

The Superior Court on appeal, under the statutory provisions in the act establishing Forsyth County Court, could only hear errors of law. Under the act the Superior Court has jurisdiction in the same manner and under the same requirements as provided for appeals from the Superior to the Supreme Court. Thus in the review upon appeal to the Superior Court the decision of the Forsyth County Court can only be heard upon "matters of law or legal inference." The facts found by the judge of the Forsyth County Court are binding on the Superior Court—

if there is any evidence to support them. If sufficient facts are not found, the judge of the Superior Court might remand the case for additional findings, but the findings of the Forsyth County Court are binding. The judge of the County Court did not find that the defendant had a "meritorious defense," nor did he find the contrary. The finding only recited the fact that the answer "denying the material allegations of the complaint, which shows a meritorious defense." The judge of the Superior Court went further and found that "the defendant has a meritorious defense in this action." This, under the law, he had no power to do, but should have remanded the cause to the county court for fuller findings. This is fully warranted by the statute, *supra,* analogous to practice in the Supreme Court.

In *Bank v. Duke,* 187 N. C., 389, it was said: "It is well settled in this State that the application should show not only mistake, inadvertence, surprise or excusable neglect, but *also a meritorious defense. Land Co. v. Wooten,* 177 N. C., 250, and cases cited; 23 Cyc., 962, 1031." *Battle v. Mercer,* 187 N. C., p. 441.

In *Bank v. Duke, supra,* p. 390, it was said: "It is the duty of the court below to find the facts, and his finding is ordinarily conclusive. Upon the facts found, the conclusion of law only is reviewable." *Turner v. Southeastern G. & L. S. Co., ante,* 331.

The power of the Forsyth County Court in other aspects has been passed upon in *Chemical Co. v. Turner, ante,* 471. The Superior Court having no power or authority to find the facts, and there being no affirmative finding of fact by the judge of the Forsyth County Court that defendant had a "meritorious defense," the judgment of the Superior Court is

Reversed.

TOBACCO GROWERS COOPERATIVE ASSOCIATION v. J. F. CHILTON.

(Filed 2 December, 1925.)

Contracts—Fraud—Evidence—Pleadings.

In order to render void for fraud in its procurement a tobacco marketing contract made in conformity with the provisions of our statute, it is required that the member seeking to do so must introduce evidence of the fraud he relies on, as well as allege it.

APPEAL by defendant from *Cranmer, J.,* at July Special Term, 1925, of ALLEGHANY.

Civil action to recover damages for breach of contract entered into between the parties and in which the defendant agreed to sell and deliver

to the plaintiff all the tobacco produced by or for him or acquired by him as landlord or lessor during the years from 1922 to 1926, both inclusive.

From a verdict and judgment in favor of plaintiff, the defendant appeals, assigning errors.

Burgess & Joyner and Kenneth C. Royall for plaintiff.
Folger & Folger for defendant.

STACY, C. J. The plaintiff is a coöperative marketing association, organized under "The Coöperative Marketing Act" of this State, chapter 87, Public Laws 1921, the constitutionality of which was sustained in *Coöperative Asso. v. Jones,* 185 N. C., 265. The defendant is a farmer engaged in growing tobacco in Surry County. Under the standard marketing agreement, entered into between the parties, the defendant agreed "to sell and deliver to the Association all of the tobacco produced by him or for him or acquired by him as landlord or lessor, during the years 1922, 1923, 1924, 1925, 1926." The defendant concedes that he has not complied with his agreement. He alleges fraud in the execution of the contract and seeks to avoid it on this ground. From a careful perusal of the record, we are unable to discover any evidence to support the defendant's allegation of fraud. For this reason, his defense must fail. *Pittman v. Tob. Gro. Asso.,* 187 N. C., 340. Allegation without proof is unavailing, unless admitted or not denied. *Dixon v. Davis,* 184 N. C., p. 209.

The record presents no reversible error, hence the verdict and judgment will be upheld.

No error.

R. W. SIMPSON v. TOBACCO GROWERS COOPERATIVE ASSOCIATION.

(Filed 2 December, 1925.)

1. Contracts—Fraud—Misrepresentations.

In order to avoid a written contract for fraud for misrepresentations of a party or his authorized agent, it must not only be shown that the statements complained of were false, but among other things that the party was at the time ignorant of their falsity, and was induced thereby to his damage, and he must show facts sufficient to make out a case of fraud with all the material elements required in such instances.

2. Appeal and Error—Agreement of Counsel—Pending Cases.

Where upon appeal the parties do not agree that the decision of the Supreme Court therein may abide that of another case pending, the Court will recognize a distinction between the two cases, and decide upon each case as presented by the record.

3. Same—Burden to Show Error—Presumptions.

The presumption on appeal to the Supreme Court is in favor of the correctness of the judgment in the Superior Court, and requires the appellant to show the error of record of which he complains.

APPEAL by plaintiff from *Cranmer, J.*, at July Special Term, 1925, of ALLEGHANY.

Civil action to rescind or cancel contract between the parties for fraud alleged to have been practiced in its procurement.

Upon denial of any fraud, and counterclaim to recover damages for a breach of the contract, there was a verdict and judgment in favor of the defendant, the plaintiff having submitted to a voluntary nonsuit upon his Honor's intimation that the representations made by defendant's agent were only promissory in character and not sufficient to avoid the contract. Plaintiff appeals.

Folger & Folger for plaintiff.
Burgess & Joyner and Kenneth C. Royall for defendant.

STACY, C. J. The allegations upon which plaintiff seeks to avoid his contract with the defendant are almost identical with those set out in the case of *Dunbar v. Tob. Gro. Asso., post,* 608. And in the instant suit, the defendant's former agent, Porter Wall, testifies that he made the representations substantially as alleged.

There was error in holding that these representations were only promissory in character, but the plaintiff has failed to show any harm resulting to him therefrom. It is not made to appear anywhere on the record that the plaintiff relied on these representations to his hurt, or that he did not know of their falsity at the time he signed the contract; nor did he offer to show facts sufficient to make out a case of fraud.

The general conditions under which factual misrepresentations may be made the basis of an action for deceit are stated in Pollock on Torts (12 ed.), 283, as follows:

"To create a right of action for deceit there must be a statement made by the defendant, or for which he is answerable as principal, and with regard to that statement all the following conditions must concur:

"(a) It is untrue in fact.

"(b) The person making the statement, or the person responsible for it, either knows it to be untrue, or is culpably ignorant (that is, recklessly and consciously ignorant) whether it be true or not.

"(c) It is made to the intent that the plaintiff shall act upon it, or in a manner apparently fitted to induce him to act upon it.

"(d) The plaintiff does act in reliance on the statement in the manner contemplated or manifestly probable, and thereby suffers damage."

It was suggested on the argument that this case should abide the same result on appeal as the *Dunbar case, supra,* but the facts appearing on the two records are not the same, and we find no agreement on the present record to the effect that evidence similar to that offered and excluded in the *Dunbar case,* should be considered as having been offered and excluded in the instant case.

While the plaintiff probably did not attempt to make out his case in full, because of the court's intimation that the representations were only promissory in character, yet we cannot assume that plaintiff's further evidence, which was not offered, so far as the record shows, would have been sufficient to make out a case of fraud. It does not appear that he did not know the provisions of the contract when he signed it. Error will not be presumed on appeal; it must be affirmatively established. Appellant is required to show error, and he must make it appear plainly, as the presumption is against him. *In re Ross,* 182 N. C., 477.

We find no error of law or legal inference appearing on the present record, hence the verdict and judgment must be upheld.

No error.

W. H. WATKINS v. AMERICAN RAILWAY EXPRESS COMPANY.

(Filed 2 December, 1925.)

1. Carriers—Express Companies—Claims—Statutes—Penalties.

C. S., 3524, permitting a recovery of a common carrier for failure to settle a claim for damages to an intrastate shipment in ninety days after a written demand has been made on it, etc., is a penal statute, and in order to recover, the plaintiff must bring his case strictly within its terms.

2. Same—Prima Facie Case—Unreasonable Delay—Burden of Proof.

The burden is on plaintiff to show that the common carrier has failed to settle his claim in ninety days, etc., after written demand under the provisions of C. S., 3524, applying to intrastate shipments, and the prima facie case made out by showing the unreasonable delay in the delivery of the shipment, is not sufficient.

3. Same—Evidence.

In an action to recover against a common carrier the penalty allowed by C. S., 3524, it was agreed that the trial judge find the facts as to whether there was a claim in writing presented to it as required by the statute, and the issue was found against the plaintiff: *Held,* the presumption is that the finding was upon sufficient evidence, nothing else appearing of record on appeal, and the appellant having failed to make out his case, the judgment of the lower court will be affirmed.

4. Same—Demand.

In order to recover the penalty for failure to settle a claim for damages within ninety days, etc., the burden is on plaintiff to show that the amount of his recovery should be at least equal to the amount of his written demand.

APPEAL by plaintiff from *Shaw, J.*, at April Term, 1925, of MONTGOMERY.

Civil action tried upon the following issues:

"1. Is the defendant indebted to the plaintiff for loss of china closet tank, as alleged? Answer: Yes, $23.12 with interest from 11th of August, 1923.

"2. Is the plaintiff entitled to recover penalty of $50 for failure to pay claim for loss within ninety days as provided by law and as alleged? Answer: No."

From a judgment on the verdict awarding the plaintiff the amount of his claim for damages with interest and costs, but denying any penalty, plaintiff appeals.

Bob V. Howell for plaintiff.

Armstrong & Armstrong and Alston, Alston, Foster & Moise for defendant.

STACY, C. J. The only question presented by this appeal is whether the plaintiff is entitled to recover the penalty of $50 given by C. S., 3524, for a failure by a common carrier, including an express company, to adjust and pay a claim for loss of or damages to property while in its possession for transportation, within ninety days after the proper filing of such claim, when the shipment, as here, is wholly within the State.

It is conceded (1) that the tank in question was delivered to the defendant in Greensboro, N. C., for shipment to the plaintiff at Troy, N. C., on 4 December, 1922; (2) that suit for damage in transit to said shipment, and to recover the penalty allowed by statute, was instituted by the plaintiff before a justice of the peace in Montgomery County on 6 August, 1923, and (3) that plaintiff is entitled to recover the full amount of his claim for damages as filed with the defendant.

The only dispute between the parties arises over the question as to whether the plaintiff waited ninety days after filing his claim with the defendant before bringing suit to enforce its collection. If he did, it is conceded by the defendant that he is entitled to recover the penalty; otherwise it is conceded by the plaintiff that he is not entitled to recover the penalty. It was agreed that his Honor should hear the evidence, and answer the second issue according to the fact, as he should find it,

relative to this one disputed question. The record is silent as to when plaintiff filed claim with the defendant, and the second issue is answered in the negative.

It is clear that the plaintiff must fail in his action to recover the penalty, first, because the issue is found against him, and, second, because he has failed to make out his case.

The failure to adjust and pay a claim for loss of, or damages to, an intrastate shipment within ninety days "after the filing of such claim" with the defendant is the substantive part of the plaintiff's cause of action to recover the penalty; and even upon a prima facie showing by the plaintiff, entitling him to go to the jury, the penalty may yet be avoided, as set out in the second proviso to the statute, unless the plaintiff "recover in such action the full amount claimed." *Sumrell v. R. R.*, 152 N. C., 269. It was said, by way of *dictum*, in *Rabon v. R. R.*, 149 N. C., 59, that where the defendant seeks to avoid the penalty on the ground that the recovery is less than the full amount claimed, "the burden was on the defendant to prove that the claim was not filed, or was excessive." This was said with respect to a claim alleged to be excessive, and it was thought that as the claim filed was necessarily in the defendant's possession and as this requirement was contained in a "proviso" to the statute, the burden should be on the defendant to show that the amount claimed exceeded the amount recovered, if such were the case, and thus bringing itself within the proviso. But it was not intended by this decision to hold that the plaintiff was not required to show a failure on the part of the defendant to adjust or pay such claim within the time prescribed by the statute. Such is the gist of an action to recover the penalty under the statute, and upon denial of liability by the defendant, the plaintiff has the burden of making out his case. *Albritton v. R. R.*, 148 N. C., 485; *Culbreth v. R. R.*, 169 N. C., p. 726; *Speas v. Bank*, 188 N. C., 524.

The principle is well established that penal statutes are strictly construed (*Sears v. Whitaker*, 136 N. C., p. 39), and one who seeks to recover a penalty for failure on the part of the defendant to discharge some duty imposed by law, must bring his case clearly within the language and meaning of the statute awarding the penalty. *Cox v. R. R.*, 148 N. C., 459; *Alexander v. R. R.*, 144 N. C., 93. And in the face of a denial of liability the burden of the issue in such case is always on the plaintiff. *Jenkins v. R. R.*, 146 N. C., 178; *Thompson v. Express Co.*, 147 N. C., 343; 30 Cyc., 1357.

No error of law or legal inference having been made to appear on the record, the verdict and judgment must be upheld.

No error.

H. M. DUNBAR v. TOBACCO GROWERS COOPERATIVE ASSOCIATION.

(Filed 2 December, 1925.)

1. Contracts—Misrepresentation—Fraud.

Where one as agent for the Tobacco Growers Association falsely represents to a prospective member certain material advantages that induce him to sign the membership contract, without affording him, an illiterate man, an opportunity to become informed as to its contents, and he, within a reasonable time afterwards, is informed of this misrepresentation, and requests the agent to take his name off the books as a member and cancel the contract: *Held*, the agent and the one to whom the false representations were made were not upon an equality as to the facts, and the law will avoid the contract for the fraud.

2. Same—Agreement and Subject-Matter.

Where one in a position to know assumes to have knowledge of the subject-matter of a contract, makes a material representation to another which induces him to sign it without being afforded an opportunity to ascertain them, the minds of the parties have not come to an agreement, and the party so induced may maintain his action to declare it void. The cases in which the representations were only promissory in character, not amounting to a factual representation, do not apply.

3. Evidence—Nonsuit.

On a motion to nonsuit upon the evidence by defendant, the evidence will be considered in the light most favorable to the plaintiff.

4. Removal of Causes—Transfer of Causes—Motions—Remand.

Where a cause has been transferred to another county than the one in which it was brought, on the ground of local prejudice, and two terms of court have been held in the latter county before the record or transcript has been received, and no steps have been taken to have it remanded until called for trial: *Held*, the order of removal may not be stricken out as a matter of right by the objecting party.

APPEAL by plaintiff from *Cranmer, J.*, at July Special Term, 1925, of ALLEGHANY.

Civil action to rescind or cancel contract between the parties for fraud alleged to have been practiced in its procurement.

Upon denial of any fraud, and counterclaim to recover damages for a breach of the contract, there was a verdict and judgment in favor of the defendant, the plaintiff having been nonsuited at the close of his evidence. Plaintiff appeals.

Folger & Folger for plaintiff.
Burgess & Joyner and Kenneth C. Royall for defendant.

STACY, C. J. The whole case pivots on the correctness of the involuntary nonsuit, entered at the close of plaintiff's evidence.

The plaintiff is an illiterate man who can neither read nor write. He was induced to sign the paper-writing, purporting to be a marketing contract between the parties, according to his allegation, upon the false and fraudulent representations of the defendant's agent as to its contents, among other things, to the effect that the defendant would pay to the plaintiff from 60 to 75 per cent of the market value of his tobacco in cash upon delivery, and issue negotiable certificates or scrip for the remainder, payable within 60 or 90 days, and further that the United States Government and the State of North Carolina were behind the defendant association and would guarantee its operations and obligations.

The plaintiff offered evidence tending to show his inability to read or write; that he asked to have the contract read at a meeting in the school house where others were signing similar contracts, but the defendant's agent stated it was too long and he had already explained its meaning and provisions; that the defendant's agent assured the plaintiff he would be paid 75 per cent of the cash value of his tobacco on delivery and receive a certificate for the balance "as good as gold"; that the government had agreed to furnish the money to pay off the first advancement; that if plaintiff didn't join then and pay his $3.00 membership fee, it would cost him $25.00 to join later when they had closed the books; that plaintiff, relying upon these representations, signed the contract at night by the light of a match without taking a copy, but during the next week, and on the day after he had heard the contract read, he went to defendant's agent and told him it did not contain the provisions as represented and he wanted his name removed therefrom; that the agent said he would see about it, though he never did.

The plaintiff offered to show the falsity of the representations made by defendant's agent, but this was excluded upon the theory that the alleged representations were only promissory in character and that they did not amount to such factual misrepresentations as are necessary to be shown in an action for fraud or deceit. *Cash Register Co. v. Townsend,* 137 N. C., 652; *Colt v. Kimball, ante,* 169.

Viewing the evidence in its most favorable light for the plaintiff, the accepted position on a motion to nonsuit, we think it is sufficient to go to the jury on the question as to whether the minds of the parties ever fully met upon the contract as contained in the paper-writing sought to be avoided. *Furst v. Merritt, ante,* p. 404.

Speaking to the sufficiency of a similar state of facts to avoid a contract, in *Whitehurst v. Ins. Co.,* 149 N. C., p. 276, *Hoke, J.,* said: "It is well recognized with us that, under certain conditions and circumstances, if a party to a bargain avers the existence of a material fact recklessly, or affirms its existence positively, when he is consciously ignorant whether it be true or false, he may be held responsible for a

falsehood; and this doctrine is especially applicable when the parties to a bargain are not upon equal terms with reference to the representation, the one, for instance, being under a duty to investigate, and in a position to know the truth, and the other relying and having reasonable ground to rely upon the statements as importing verity," citing authorities for the position.

To like effect are the decisions in *Machine Co. v. Feezer,* 152 N. C., 516, *Jones v. Ins. Co.,* 151 N. C., 53, *May v. Loomis,* 140 N. C., 358, and many others in our reports.

And as to responsibility attaching for such statements, when the parties are not on equal terms in reference to them, it is said in Smith on Fraud, sec. 3: "The false representation of a fact which materially affects the value of the contract and which is peculiarly within the knowledge of the person making it, and in respect to which the other party, in the exercise of proper vigilance, had not an equal opportunity of ascertaining the truth, is fraudulent. Thus representations made by a vendor to a purchaser of matters within his own peculiar knowledge, whereby the purchaser is injured, is a fraud which is actionable. Where facts are not equally known to both sides a statement of opinion by one who knows the facts best involves very often a statement of a material fact, for he, impliedly, states that he knows facts which justify his opinion."

The misrepresentations alleged to have been made and relied upon in the instant case are no more promissory in character than the one held to be sufficient to avoid the contract in *Caldwell v. Ins. Co.,* 140 N. C., 100. There, a colored woman, who could neither read nor write, was induced to take out a policy of life insurance, upon the representation of the defendant's agent, falsely and fraudulently made, as was found by the jury, that she could "draw out her claim" at the end of 10 years. And to like effect are the parallel cases of *Stroud v. Ins. Co.,* 148 N. C., 54, and *Sykes v. Ins. Co., ibid.,* 13.

In an action between the original parties to an instrument, as here, if it be made to appear that one induced the other to execute the paper-writing upon his representation as to its contents, and the representation turns out to be untrue and fraudulently made, the party who relied upon it, to his injury, if he acted with reasonable prudence in the matter, is not bound to him who deceived him into executing the instrument. *Furst v. Merritt, ante,* 403.

The defendant relies upon the cases of *Pittman v. Tob. Gro. Asso.,* 187 N. C., 340, and *Kansas Wheat Gro. Asso. v. Floyd,* 227 Pac., 336, but in both of those cases the parties could read and write and each knew what was in his contract. They are, therefore, distinguishable from the case at bar.

We refrain from any discussion of the evidence, as the defendant has not yet been heard. The motion for judgment as of nonsuit was allowed at the close of plaintiff's evidence.

There is also an exception appearing on the record addressed to the refusal of the court to remand the case to Surry County for trial. The denial of this motion cannot be held for error. *Cline v. Mfg. Co.*, 116 N. C., 837.

At the August Term, 1924, of Surry Superior Court, on motion of the defendant, a number of cases of like character, including the present one, were ordered removed to Alleghany County for trial, it being asserted in affidavits, filed for the purpose, that the defendant could not obtain a fair trial in Surry County. Two terms of court intervened in Alleghany County before the papers were actually transferred. No motion was made in either county, because of this delay, until the case was called for trial at the July Special Term, 1925, of Alleghany.

In *Fisher v. Mining Co.*, 105 N. C., 123, it was said that if, after obtaining an order for the removal of a cause to another county for trial, the party obtaining the order does not docket the transcript in the county to which it is removed at the next succeeding term of court, regularly scheduled to be held therein, the Superior Court of the county from which it has been ordered to be removed may, at the first term held thereafter, upon proof of such failure, strike out the order of removal. This is in analogy to an appeal to this Court in which, if the transcript is not docketed here at the proper time and no *certiorari* is allowed, the court below, on proof of such facts, may, on proper notice, adjudge that the appeal has been abandoned, and proceed in the cause as if no appeal had been taken. *Jordan v. Simmons,* 175 N. C., p. 540; *Avery v. Pritchard,* 93 N. C., 266.

The judgment of nonsuit will be reversed and the cause remanded for another hearing.

New trial.

J. F. BOWMAN v. CITY OF GREENSBORO.

(Filed 2 December, 1925.)

1. Actions — Tort-Feasors — Primary and Secondary Liability — Judgments—Statutes.

The primary and secondary liability as between two joint *tort-feasors* should be adjusted in the same action, where there are two defendants sued for the same negligent act alleged in the complaint, and judgment in the consolidated cases accordingly may be rendered under our statute. C. S., 602.

2. Same—Demurrer.

Where the plaintiff sues a city for its negligence in failing to remove a dangerous menace over its sidewalk, and the answer though denying negligence, sufficiently sets up a primary liability on the part of an adjoining property owner who is ordered to be made a party defendant in the answer, the failure of the plaintiff to amend his complaint as allowed by the court does not give the defendant thus brought in the right to successfully demur to the sufficiency of the complaint, and have the action dismissed as to him, the allegations of the answer being sufficient. C. S., 602, 508, 511.

APPEAL by defendant from *McElroy, J.*, GUILFORD Superior Court, May Term, 1925. Reversed.

Relevant facts: The plaintiff brought an action against the defendant and alleged: "That on 20 April, 1924, the plaintiff was walking northwardly upon the sidewalk of the west side of North Elm Street in the city limits of Greensboro, and was only a short distance from the city hall, when suddenly a large limb, some three or five inches in diameter and ten to fifteen feet long, fell from a tree in close proximity to said sidewalk, a distance of about fifty feet, and struck the plaintiff a severe blow on the head, knocking him unconscious," etc. . . . That on or about .... February, 1924, Greensboro and the surrounding country was visited by a terrific sleet; that many trees were broken down and the limbs of others fell to the ground on account of the weight of the ice and sleet; but that still other large limbs, although broken or nearly broken from said trees, were left hanging, their support being the lower limbs of the tree. That the particular tree from which the limb herein complained of was broken, was within sight from the windows of the police department of the city of Greensboro, and only about two hundred feet or more from the city hall. That the said city of Greensboro, through its officers and agents, knew or by the exercise of reasonable care could have known, of the dangerous condition resulting from the large limbs hanging in said tree directly over the sidewalk of Greensboro's main thoroughfare." . . . And that the negligence of the said city of Greensboro, in permitting the said limb to hang in such tree, for so long a period of time, and resulting in its fall upon the plaintiff, as aforesaid, was the direct and proximate cause of the plaintiff's injury; and that said city failed to exercise reasonable care to discover the defects resulting in the plaintiff's injury, or if it knew of such condition, was guilty of gross negligence in not remedying the same. That said limb was easily observable and was or could easily have been seen by the officers, agents and servants of the defendant."

The defendant in its answer said: "That it is admitted that on or about 20 April, 1924, plaintiff, while walking northwardly upon or near the west sidewalk of North Elm Street, was struck by a falling limb,

and injured thereby; but it is expressly denied that the tree from which such limb fell was standing within the street and sidewalk limits, and it is expressly denied that before such limb fell, it projected over the street or sidewalk, or any part thereof. . . . It is admitted that the tree from which the limb that injured plaintiff fell, was within sight of the city hall and about 200 feet therefrom." Defendant denied all other allegations and for a further defense avers: "That at the time of the alleged injury to plaintiff, C. G. Wright was the owner and in possession of the lot on which stood the tree mentioned in the complaint; that if any injury was caused the plaintiff by the falling of a limb from said tree, the defendant is not liable in damages therefor; or if the defendant is in any manner liable to plaintiff by reason of the matters alleged in the complaint the defendant, city of Greensboro, is only secondarily liable and that the said C. G. Wright is primarily liable therefor; and that if the plaintiff should recover of the defendant in this action, the defendant would be entitled thereby to maintain an action against and to recover from the said C. G. Wright." Defendant prays: "(a) That C. G. Wright be made a party defendant in this action; (b) that an issue as to primary liability as between the defendant, city of Greensboro, and the said C. G. Wright, be submitted to the jury; and (c) that the defendant, city of Greensboro, go hence without day and that it recover its costs, to be taxed by the clerk."

Upon notice being served on C. G. Wright, he appeared and the court below made the following order: "It is ordered that C. G. Wright be and he is hereby made a party defendant in this action. It is further ordered that summons be served on C. G. Wright, unless service is accepted by him, such summons to be returnable 1 April, 1925; that on or before 1 April, 1925, the plaintiff, if he desires, may file a new or amended complaint herein, that within twenty days from 1 April, 1925, C. G. Wright shall file his demurrer or answer; and that if the plaintiff files an amended complaint on or before 1 April, 1925, the defendant city of Greensboro may, within twenty days thereafter file an amended answer."

C. G. Wright made no exception to this order. The plaintiff did not file an amended complaint, as he was allowed to do, but Wright filed a demurrer as follows: "That on or about .... March, 1925, after the complaint in said cause had been filed, defendant, city of Greensboro, filed its answer and obtained an order of the court making said C. G. Wright a party defendant and ordering that summons be served on him returnable 1 April, and granting leave to plaintiff on or before said 1 April, to file a new or amended complaint and granting leave to C. G. Wright to demur or answer within twenty days from said 1 April; that no amended complaint has been filed in said cause by plain-

tiff; and that the complaint heretofore filed by plaintiff sets up no cause of action against C. G. Wright and contains no prayer for relief as to him."

The court below rendered the following judgment: "This cause coming on to be heard at May Term, 1925, of Guilford Superior Court before the Honorable P. A. McElroy, judge presiding, upon the demurrer filed therein by the defendant, C. G. Wright, who was heretofore made a party defendant at the instance and upon the motion of defendant city of Greensboro, it is now, after consideration of and hearing argument upon said demurrer, considered, ordered and adjudged that it be and it is hereby sustained."

To the judgment sustaining the demurrer, the city of Greensboro excepted, assigned error and appealed to the Supreme Court.

T. Bernard Wright and Bynum, Hobgood & Alderman for C. G. Wright.

Fentress & Moseley for City of Greensboro.

CLARKSON, J. It is a well established rule that a party injured can sue any or all joint *tort-feasors* for actionable negligence. As a general rule there can be no contribution or indemnity among mere *tort-feasors.* This rigor of the rule is modified in two classes of cases: "Where the party claiming indemnity has not been guilty of any fault except technically or constructively, as where an innocent master is held to respond for the tort of his servant acting within the scope of his employment; or, where both parties have been in fault, but not in the same fault, towards the party injured, and the fault of the party from whom indemnity is claimed was the primary and efficient cause of the injury. Very familiar illustrations of the second class are found in cases of recovery against municipalities for obstructions to the highways caused by private persons. The fault of the latter is the creation of the nuisance, that of the former the failure to remove it in the exercise of its duty to care for the safe condition of the public streets; the first was a positive tort and the efficient cause of the injury complained of, and the latter the negative tort of neglect to act upon notice express or implied." *Gregg v. Wilmington,* 155 N. C., p. 24 and cases cited.

In cases like the one now being considered—as between the joint *tort-feasors*—it was said in *Dillon v. Raleigh,* 124 N. C., p. 187: "The question of primary and secondary liability is for the offending parties to adjust between themselves. The injured party shall have his remedy against either as they fail under the rule as to joint *tort-feasors.*" *Gregg v. Wilmington, supra.*

C. S., 602, is as follows: "Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several

defendants; and it may determine the ultimate rights of the parties on each side, as between themselves." 2. "It may grant to the defendant any affirmative relief to which he may be entitled."

31 Cyc., pp. 223-4 says: "In the absence of such an express authority, the practice of allowing cross complaints to be filed against codefendants in analogy to the cross bill of the chancery practice has been sanctioned by the courts in The Code states generally as a means of effectuating the provision ordinarily made in The Codes, that the judgment rendered may, when the justice of the case requires it, determine the ultimate rights of the parties on each side as between themselves. A cross action by a defendant against a codefendant or third party must be in reference to the claim made by plaintiff and based upon an adjustment of that claim. Independent and unrelated causes of action cannot be litigated by cross actions."

Smith, C. J., in *Hulbert v. Douglas,* 94 N. C., 129, says: The rule in Chancery, to which the code practice is intended to be assimilated in this feature, is thus clearly stated by *Chancellor Walworth,* in his opinion in *Elliott v. Pell,* 1 Paige (N. Y.), 253: 'It is settled law of this Court, that a decree between codefendants, *grounded upon the pleadings and proofs between the complainant and the defendants,* may be made, and it is the constant practice of the Court to do so, to prevent multiplicity of suits,' citing cases; 'but such decree between codefendants, to be binding upon them, *must be founded upon, and connected with the subject-matter in litigation between the complainant, and one or more of the defendants.'*" *Baugert v. Blades,* 117 N. C., 221; *Bobbitt v. Stanton,* 120 N. C., 253; *Page Trust Co. v. Godwin, ante,* 512.

Wright contends, with some force of reasoning, that plaintiff does not sue him and refuses to make any complaint against him; that there is neither in the complaint nor answer of defendant any allegations of negligence against him. That plaintiff refuses to charge Wright with negligence, and says: "C. S., 508, provides that 'the only pleading on the part of the defendant is either a demurrer or an answer.' Section 511 provides that 'a defendant may demur to the complaint when it appears upon the face thereof . . . that the complaint does not state facts sufficient to constitute a cause of action.'"

C. S., 602, must be construed in connection with sections 508 and 511. The complaint of plaintiff is for actionable negligence against the city of Greensboro. The answer denies liability, but says if it is liable that Wright is primarily liable, that the city's negligence was secondary and Wright's primary. This makes Wright related with plaintiff's claim and comes within the cross-action rule. Wright cannot be heard, under such facts and circumstances, to take advantage of plaintiff's refusal to mulct him. The city has the right that the primary and secondary liability be settled in this action. The city becomes the movant, its

claim is founded, related and connected with the subject-matter between the plaintiff and the city and Wright. This is the foundation of the cross action. If Wright, from the complaint and answer, is not sufficiently informed as to the details, he can, under C. S., 534, ask for a bill of particulars. *Power Co. v. Elizabeth City,* 188 N. C., p. 285. Our Code, C. S., 535, says: "In the construction of a pleading for the purpose of determining its effect its allegations shall be liberally construed with a view to substantial justice between the parties."

In the *Gregg case, supra,* p. 22, it is said: "If she had sued the city alone, a question might have arisen as to whether it would be proper to make Woolvin a party, at the request of the city and against the plaintiff's consent, even if thereby the entire controversy could be settled in one action." In the *Gregg case, supra,* both the city of Wilmington and James F. Woolvin were sued. In *Guthrie v. Durham,* 168 N. C., 573, only the city of Durham was sued. The case states, at p. 574: "This is an appeal from the refusal of the court to grant the motion of the defendant to make A. E. Lloyd a party defendant. . . . The city of Durham, upon the allegations set up in its answer, moved to have A. E. Lloyd made a party. Upon notification of said motion, Lloyd appeared and asked to be made a party, that he might make his defense, but the court declined the motion, and the defendant excepted. . . . (p. 575). The fact that the plaintiff could sue both the city of Durham and Lloyd does not determine that they are both liable in the same degree. It is true that the city gave Lloyd the permit to make the excavation and was charged with the duty of supervising his operations to prevent injury to the public, and if it neglected to do so, it is liable to the plaintiff. But the primary liability may be upon Lloyd, there being evidence tending to show that his negligence, if any, was antecedent to that of the city if it was negligent in not giving efficient supervision. *Upon the facts set out in the answer the defendant, the city of Durham, was entitled to have Lloyd made a defendant* (Italics ours), and he was *a fortiori* entitled to have his motion, to come in and defend the action, granted." *Ridge v. High Point,* 176 N. C., p. 421.

We think the answer of the city of Greensboro practically the same as set up by the cities of Wilmington and Durham in the cases, *supra.* Courts, under the liberal practice to avoid multiplicity of actions, and where the rights of parties are not prejudiced and where substantial justice can be done between the parties, hold this should be done in one and the same action. We can see no hardship that will come to Wright from this. If he was not compelled to defend in this action, and plaintiff should recover against the defendant, he would have to defend under the law of primary and secondary liability in an independent action.

For the reasons given the demurrer is overruled.

Reversed.

MARTHA MICHAUX v. PAUL RUBBER COMPANY, M. W. McCONNELL, E. W. McCONNELL AND E. E. BARRINGER.

(Filed 2 December, 1925.)

1. Trial—Jury—Agreement—Discretion of Court—Appeal and Error.

Where a defendant introduces evidence on the trial, his request for the opening and concluding speech to the jury is addressed to the discretion of the trial judge, and his refusal is not appealable. Rule 6, 185 N. C., 808.

2. Bills and Notes — Negotiable Instruments — Fraud—"Due Course"—Damages—Instructions.

Where fraud in the procurement of the note sued on is found, and defendants plead and offer evidence to show that they are innocent holders for value, an instruction upon the measure of damages is not error that makes them dependent upon the answer to this issue.

3. Instructions—Appeal and Error—Requests.

Where correct prayers for special instructions are offered in apt time upon the trial, it is only required that in the general charge they are sufficiently and substantially given by the trial judge.

4. Same—Issues.

A requested instruction that does not fully in all material aspects cover the principles of law applicable to the relative evidence, is properly refused when in his general charge the correct principles applicable to each issue is separately and correctly given.

5. Same—Statutes—Expression of Opinion.

An instruction is properly refused that would in part ignore conflicting evidence upon an issue involved in the trial.

APPEAL by defendant, E. E. Barringer, from BURKE Superior Court. *Stack, J.*

Action by plaintiff to cancel $3,000 note, payable to Paul Rubber Company, execution of which is alleged to have been procured by fraud. Judgment for plaintiff, and defendant Barringer appeals. No error.

The following verdict was rendered:

"1. Was the plaintiff, Martha R. Michaux, induced to execute and deliver the $3,000 note in controversy herein to the Paul Rubber Company by the false and fraudulent representations and assurances of the defendant, the Paul Rubber Company, and its agents, as alleged in the complaint? Answer: Yes.

"2. If so, is the defendant, E. E. Barringer, a holder in due course of the $3,000 note in controversy herein, as alleged in the answer? Answer: No.

"3. In what amount, if any, is the plaintiff indebted to the defendant? Answer: Nothing."

S. J. Ervin and S. J. Ervin, Jr., for plaintiff.
Spainhour & Mull and Avery & Hairfield for defendant.

VARSER, J. The defendant Barringer assigns error for that he offered to admit in due time that the $3,000 note had been "executed and induced by the false and fraudulent representations of the defendant Paul Rubber Company and its agents," and asked for the opening and conclusion of the argument. The request was denied. This assignment of error is not sustained. Rules of Practice in the Superior Court, 6, 185 N. C., 808.

The defendant introduced evidence in his behalf and therefore did not come within Rule 3, 185 N. C., 807, and the disposition of the question as to who should open and conclude the argument is not reviewable here. *Churchill v. Lee,* 77 N. C., 341; *Johnson v. Maxwell,* 87 N. C., 18; *Cheek v. Watson,* 90 N. C., 302; *Brooks v. Brooks,* 90 N. C., 142; *Austin v. Secrest,* 91 N. C., 214; *Shober v. Wheeler,* 113 N. C., 370; *Banking Co. v. Walker,* 121 N. C., 115; Rules of Practice, 164 N. C., 562, 563; *Lumber Co. v. Elizabeth City,* 181 N. C., 442.

The defendant's third, fourth and fifth assignments of error relate to the charge as to the amount of recovery in favor of defendant. These instructions applied only in the event the jury found he was a holder in due course. The defendant held as collateral security to a debt due him by the Paul Rubber Company, a note called the Johnson note, and he surrendered the Johnson note for the Michaux note and there was a contention on part of the plaintiff, and evidence tending to support it, that the Johnson note was either worthless or of small value. The verdict of the jury on the first and second issues are decisive of this cause. The jury did not answer the third issue, hence there can be no prejudice to this defendant in the challenged instructions and we cannot consider them. *Ginsberg v. Leach,* 111 N. C., 15; *Allen v. McLendon,* 113 N. C., 325; *Stewart v. R. R.,* 136 N. C., 385; *Cannady v. Durham,* 137 N. C., 72; *Hamilton v. Lumber Co.,* 160 N. C., 52; *Beck v. Wilkins-Ricks Co.,* 186 N. C., 215; *Sams v. Cochran,* 188 N. C., 734.

The defendant contends that these instructions necessarily relate to the second issue in so far as value is an essential element in the definition of a holder in due course. An examination of the charge discloses a careful and painstaking and successful effort on the part of the learned trial judge to relate his instructions to each issue separately. The excerpts challenged by these assignments are expressly limited to the third issue, and full and correct instructions are given on the first and second issues. They are as favorable to the defendant as our decisions will permit.

The sixth and seventh assignments of error are to the refusal of the trial court to give certain special instructions aptly and timely requested by defendant.

The requested instruction, upon which the sixth assignment is based, is covered in the charge with much particularity and directness, and the defendant had the full benefit of this principle relating to negotiable instruments held as collateral security. The court was not required to give this instruction in the exact language requested, it was sufficient to give the instruction in other languages equally explicit and clear. *Shaw v. Public Service Corp.*, 168 N. C., 611; *Lewis v. Fountain*, 168 N. C., 277; *Guano Co. v. Mercantile Co.*, 168 N. C., 223; *Zollicoffer v. Zollicoffer*, 168 N. C., 326; *Medlin v. Telegraph Co.*, 169 N. C., 495; *Coward v. Manly*, 173 N. C., 716; *Cochran v. Smith*, 171 N. C., 369; *Mumpower v. R. R.*, 174 N. C., 742; *Talley v. Granite Quarries Co.*, 174 N. C., 445; *Hall v. Giessell*, 179 N. C., 657; *Parker v. R. R.*, 181 N. C., 95; *Fowler v. Apperson*, 180 N. C., 669; *Pusey v. R. R.*, 181 N. C., 137; *Bowman v. Development Co.*, 183 N. C., 162; *Williams v. Hedgpeth*, 184 N. C., 114.

The requested instruction, upon which the seventh assignment of error is based, was properly refused. In order to form the basis of a successful assignment in this Court, the requested instruction must be refused, and not given in the general charge, either in express terms or substantially, must be directed to one of the issues submitted, and must, in its entirety, and in every substantial and integral part thereof, be correct in law. *Savings Bank v. Chase*, 151 N. C., 108, 111; *Bost v. Bost*, 87 N. C., 477; *Ins. Co. v. Sea*, 21 Wallace (U. S.), 158; *S. v. Ledford*, 133 N. C., 714; *S. v. Stewart*, 156 N. C., 636; *Ricks v. Woodard*, 159 N. C., 647; *R. R. v. Mfg. Co.*, 169 N. C., 165, 169; *Quelch v. Futch*, 175 N. C., 694, 695; *Pope v. Pope*, 176 N. C., 283, 286. This rule, with reference to requested instruction, or in objection to the charge of the judge, when such portion of the charge excepted to, or the instruction requested when it contains several propositions, stands upon the same basis as general objection to evidence, consisting of several distinct parts, some of which are competent and some incompetent, and in such case, he who assigns the error must, in the trial court, specify his ground of objection, and must confine it to the incompetent evidence, and, in the case of requested instruction, he must make his request correct in law in every respect, or divide it so that only one proposition of law will be contained in each separate request. When this is done the trial court can be reviewed as to each proposition, otherwise the assignment of error cannot be considered here. *S. v. Ledford, supra; Barnhardt v. Smith*, 86 N. C., 473; *McRae v. Malloy*, 93 N. C., 164; *Smiley v. Pearce*, 98 N. C., 185; *Hammond v. Schiff*, 100 N. C., 161; *S. v. Stanton*, 118 N. C., 1182.

The seventh instruction, if given, would have violated, clearly, the statutory inhibition against an expression of opinion by the trial judge on a question of fact, and the evidence appearing in the record, when viewed in its most favorable light for the plaintiff, is sufficient for the jury to find that Barringer was not without notice of such facts and circumstances as to prevent him from occupying a position of a holder in due course. Upon the second issue this instruction was practically a demurrer to the evidence, and could not be sustained. It contains several propositions of law, and some of them are clearly inapplicable.

We have examined all of the assignments of error and find ourselves unable to sustain any of them. The case has been correctly tried and the contentions of the appellant have been ably presented by his diligent and accomplished counsel and his rights clearly set forth in a correct charge. Therefore, we conclude that there is

No error.

TRIPHENIA E. (BERRIER) COOK v. ADAM L. SINK.

(Filed 9 December, 1925.)

1. Equity—Estoppel—Wills—Devise—Heirs at Law.

A devise of the entire real and personal estate to the testator's wife and by a later item certain parts thereof to his two sons to see that their mother "don't suffer their care," etc.: *Held*, a division of the lands by the heirs at law subject to the terms of the will, and their consent in relation thereto is an equitable estoppel *in pais* against their claim that their mother acquired a fee-simple title, and that they could claim as her heirs at law, after her death, intestate.

2. Appeal and Error—Trials in Lower Court.

Ordinarily the case on appeal is heard and determined according to the theory upon which it was tried in the Superior Court.

3. Estates—Wills—Devise—Conditions Subsequent.

A devise of land to the testator's son and daughter "if either of them fail to see that their mother don't suffer their care, if either of them fail to take care of her their part to go to someone who will care for her, for them, their bodily heirs, if any, if none to next of kin": *Held*, the testator's named children, did not take an estate upon condition subsequent, but acquired their designated portion subject to a charge thereon for the support of their mother.

4. Same—Wills—Intent—Forfeiture—Re-entry.

In order to create an estate upon condition subsequent by will that will work a forfeiture upon condition broken, the intent of the testator must clearly appear from the construction of the will, reasonably employing words that create a forfeiture or rights of reëntry.

5. Estates — Conditions Subsequent — Covenants — Damages — Liens— Wills—Devise.

A devise to the testator's son and daughter upon condition that they care for their mother, etc., will be construed to avoid a forfeiture, and when they take under the terms of the will and breach the condition, they take as upon a covenant, for the breach of which damages to the extent of the support provided for will be awarded and declared a lien upon their respective lands.

6. Same—Recital—Estoppel.

Where the son and daughter take lands under the will of their father charged with the support of their mother, and the mother lives with the daughter under an agreement that the son will contribute his share, and the son has conveyed his lands subject to this agreement: *Held*, the receipt by the daughter in full from the son's grantee for the latter's obligation, fairly given, over her signature, will preclude her from a further recovery and by this and other of her acts in this case she is estopped to claim damages from her brother in breach of his implied covenant.

ADAMS and VARSER, JJ., concur in result.

APPEAL by defendant from *Schenck, J.*, July Term, 1925, DAVIDSON Superior Court. Reversed.

Relevant facts: This action was brought by plaintiff against the defendant to recover the possession of 100 acres of land, less 51¾—to wit, 48¼ acres. In the will of W. A. Berrier, the material clauses are as follows:

"First. I give and bequeath unto my beloved wife Elizabeth all my real and personal property, to have the right to collect all debts coming to me, to pay all debts I owe, to sell real or personal property for her own use and benefit at my death to make sale, sell all loose property she doesn't need for her own use and benefit, the money for same to pay what I owe, if any left to her own use.

"Second. I give unto my son D. T. Berrier and my daughter Triphenia E. Berrier, 200 acres of land to be equally divided between them on the east run by a north and south line, then divided by east and west line, for David to have the south end provided he pay Triphenia $125.00 for to finish the house and dig a well, if David want to do that, for Triphenia, if David wont pay the $225.00 to Triphenia for her to pay it to same and for her to have the south piece for them both to see that their mother dont suffer their care, if either of them fail to take care of her for their part to go to some one who will care for her, for them their bodily heirs if any, if none to next of kin.

"Third. I give to my daughter Mary D. Shoaf 65 acres of land on the south east corner, run so as to include the house and spring known as the Robert house, and a cartway over the other lots to the public road.

"Fourth. To Wm. H. Berrier the balance of my land what is more or less during his life, at his death to his bodily heirs, if none to next of kin, for him to have the accounts found against him at my death."

W. A. Berrier died 3 May, 1902. On 19 October, 1904, Bettie Hepler (so designated in deed now the plaintiff, Triphenia E. Berrier Cook) and her husband, J. F. Hepler, Mary D. Shoaf, and W. H. Berrier made; executed and delivered to David T. Berrier a deed which was duly recorded 29 June, 1905, in the register of deeds office for Davidson County, N. C., for 100 acres of land more or less setting forth the metes and bounds. The locus, 48¼ acres, in controversy is a part of the land. The deed had the following recitals: "That said parties of the first part, in consideration of one dollar and the further consideration of a division of the lands of W. A. Berrier to him paid by said party of the second part, the receipt of which is hereby acknowledged . . . This being the part of David T. Berrier in the division of lands of W. A. Berrier under will of said W. A. Berrier. . . . And the said parties of the first part covenant that they are seized of said premises in fee, except the interest of Mrs. W. A. Berrier under said will, and have right to convey the same; that the same are free and clear from all encumbrances and that they will warrant and defend the said title to the same against the claims of all persons whomsoever."

On 29 June, 1905, David T. Berrier made, executed and delivered a deed to Adam L. Sink, defendant, which deed was duly recorded in the office of the register of deeds of Davidson County, N. C., on the same date as deed. The consideration was $1000 stated in the deed. The land conveyed was the 100 acres by metes and bounds (less 51¾) with recital: "This being the part of David T. Berrier in the division of lands of W. A. Berrier under will of said W. A. Berrier. Less 51¾ acres sold to R. L. McCrary. For boundaries see Deed Book No. 58, page 277, in office of register of deeds for Davidson County, N. C." The covenant is as follows: "And the said parties of the first part covenant that they are seized of said premises in fee, except the interest of Mrs. W. A. Berrier under said will, and have the right to convey the same in fee simple; that the same are free and clear from all encumbrances and that they will warrant and defend the said title to the same against the claims of all persons whomsoever."

Elizabeth Berrier, wife of W. A. Berrier, died 27 March, 1924, 88 years old. After the death of W. A. Berrier, his son, David T. Berrier, lived at the old home place part of same now claimed by defendant, Adam L. Sink. Elizabeth Berrier stayed with her son, David T. Berrier, at the old home place about a year after the death of her husband. David married and his mother then went to live with the plaintiff and

lived with her until her death. David lived on the old home place until 1905, when he sold part of it to defendant, who has been in possession ever since. Plaintiff can read and write. She never made claim on R. L. McCrary for the part of the 100 acres of land, to wit, 51¾, deeded him by David T. Berrier. She got a deed from David T. Berrier and the others at the time she and others made deed to David in the land settlement under the will.

Plaintiff testified: "I never asked defendant for anything. He paid me some money every year. Paid the rent. . . . Neither D. T. Berrier nor defendant paid me $225 provided for in the will. . . . Defendant gave me a check for $25 a year. He did not say 'here is a check for your mother. I gave it in your name for I knew she was not able to get the check cashed.' Sometimes he would see me here in town. Never would bring it to me. Never did say what the check was for, and I did not ask him, and I cannot tell you how much it amounted to, but I reckon in all it would amount to $500 or $600 he paid in the time he had the land until mother's death."

Adam L. Sink testified in part: "I am in possession of the land conveyed by the deed of David T. Berrier to me, offered in evidence, and have been in possession of it for about 19 years. David T. Berrier was in possession of the land when I bought it. I don't suppose there is over 9 or 10 acres in cultivation. There is a very old dilapidated building on it. I have other land adjoining it. The rental value of the land I bought from David T. Berrier is worth about $25 per year. I bought the land. I don't know whether Elizabeth Berrier was living with David T. Berrier or Bettie Hepler (plaintiff). After I bought the land I had an agreement with Bettie Hepler, plaintiff, as to taking care or assisting in taking care of her mother, Elizabeth Berrier. She was to care for her, support her, and anything that came up. I paid her the $25 in advance. I think probably in January, 1906. In consequence of this agreement I paid Bettie Hepler and took her receipt, signed Bettie E. Hepler, W. H. Berrier, witness.' Berrier is her brother. . . . Since that time I would make payments first of every year from 1906 to 1924. Never failed to pay it. Paid $25 a year and from that I went to $50 a year. Last few years paid $60. Did not take receipts—only the checks. She said she would receipt me any time I called for it. I found some checks that I have paid last 2 years. I did not save the checks. Did not think of any dispute. It was perfectly agreeable and everything satisfactory. Bettie never asked me for anything further; always said it was a plenty; I had done my part. . . . I never paid any rent on the land. I was to pay so much for caring for her mother, and she never asked for a brownie more."

Defendant introduced the following:

LEXINGTON, N. C., January 1, 1906.

Received Jan. 1, 1906, of A. L. Sink, $25.00 dollars in full for all claims I have or may have against him for support of my mother to Jan. 1, 1907. The same is in lieu of David T. Berrier's part toward the support of my mother.

Witness: W. H. Berrier. T. T. HEPLER (Seal).

"A. L. SINK, *Grocer.* No. 594.

LEXINGTON, N. C., January 31, 1922.

Pay to the order of Bettie Hepler Cook $60.00.
For Board and Dr. Bill. A. L. SINK.
To Commercial & Savings Bank, Lexington, N. C.
(Endorsed by Bettie Hepler Cook.)

"A. L. SINK, *Grocer.* No. 38.

LEXINGTON, N. C., January 31, 1923.

Pay to the order of Bettie Cook $50.00.
For her mother's support. A. L. SINK.
To Commercial & Savings Bank, Lexington, N. C.
(Endorsed by Bettie Cook.)

"A. L. SINK, *Grocer.* No. 482.

LEXINGTON, N. C., January 19, 1924.

Pay to the order of Bettie Cook $60.00.
For mother's support in full—paid to January, 1925. A. L. SINK.
To Commercial & Savings Bank, Lexington, N. C.
(Endorsed by Bettie Cook, W. H. Berrier.)"

Plaintiff, in her prayer for relief demands judgment for the said land and so much per year for its retention, etc.

In reply to the answer plaintiff demands judgment for the land; and if she is estopped by her deed from the recovery of the land, she prays for judgment for a lump sum and that it be declared a lien on the land.

The issues submitted to the jury and their answers thereto, were as follows:

"1. Is the plaintiff the owner and entitled to recover of the defendant the lands described in the complaint? Answer: Yes.

"2. What amount, of rents, if any, is the plaintiff entitled to recover of defendant for the detention of said lands? Answer: Not any."

Other facts and pleadings necessary for decision of this case will be stated in the opinion.

Phillips & Bower, Walser & Walser and Z. I. Walser for plaintiff.
J. R. McCrary and Raper & Raper for defendant.

CLARKSON, J. The will of W. A. Berrier, which we are called upon to construe, from its language seems to have been drawn *inops con silii.* In the first item is: "I give and bequeath unto my beloved wife Elizabeth all my real and personal property."

Immediately after W. A. Berrier's death, 3 May, 1902, David T. Berrier lived at the old home place, a part of which place (48¼ acres) is now, by warranty deed from David T. Berrier, claimed by defendant who is in possession of same. Elizabeth Berrier lived there about a year and then went and lived with plaintiff and lived with her continuously until her death, 27 March, 1924—over 20 years. The division deed from plaintiff and others to David T. Berrier, made 19 October, 1904, described his part of the land, under item 2 of the will, by metes and bounds, and included the locus in controversy. We think if Elizabeth Berrier had a fee-simple title under the will, at her death, plaintiff, one of her heirs at law, or the others who signed the deed, could not now claim the land in controversy as heir to the mother. The deed from plaintiff and others (with full covenants of warranty), under the facts and circumstances of this case, operates as an equitable estoppel against the parties and privies. Plaintiff and the other heirs at law took under the will as did their mother, Elizabeth Berrier, from the same common source—W. A. Berrier. In the division of the land under the will it was construed and plaintiff and the other devisees so acted, and their mother, Elizabeth Berrier, for over 20 years so acted, as if no estate in fee of the locus in controversy under the will was devised to Elizabeth Berrier. The plaintiff and other devisees took under the will contrary to a fee in Elizabeth Berrier, and neither plaintiff nor the devisees can now claim as heirs of law of their mother. They cannot "blow hot and cold in the same breath." Any other view would be inequitable and unconscionable.

Plaintiff or the other devisees cannot take inconsistent positions. "Upon a principle similar to that applied to persons taking under wills, beneficiaries under a trust are estopped, by claiming under it, to attack any of its provisions. . . . So, also, one who accepts the terms of a deed or other contract must accept the same as a whole; one cannot accept

part and reject the rest." Bigelow on Estoppel, 6 ed., p. 744. *Fort v. Allen,* 110 N. C., 191; *Chard v. Warren,* 122 N. C., 86; *Freeman v. Ramsey,* 189 N. C., 790.

"Where a person has, with knowledge of the facts, acted or conducted himself in a particular manner, or asserted a particular claim, title, or right, he cannot afterwards assume a position inconsistent with such act, claim, or conduct to the prejudice of another." 16 Cyc., p. 785; *Holloman v. R. R.,* 172 N. C., p. 376.

The $225 plaintiff claimed she never received under item 2 of the will, if she did not waive this by the division deeds, she has no claim on defendant—the grantee of her brother.

Plaintiff, in her brief, says: "Is plaintiff, appellee, estopped to claim the land by her deed to David T. Berrier?" We do not think the principle contended for by plaintiff, from the view we take of the language in the will and intent of the testator, applicable here. We cite the authorities in the carefully prepared brief of her counsel: "A grantee in a partition deed is not estopped to set up an after-acquired title. . . . The fact that there are covenants of warranty in a partition deed do not change the estate conveyed, and therefore, do not create an estoppel." In *Coble v. Barringer,* 171 N. C., 449, it is said: . . . "The office of a covenant of warranty is, of course, not to enlarge or curtail the estate granted in the premises of the deed, but the covenant is intended as an assurance or guaranty of the title. *Huntley v. Cline,* 93 N. C., 458; *Williams v. Lewis,* 100 N. C., 142; *Harrison v. Ray,* 108 N. C., 215; *Jones v. Myatt,* 153 N. C., 230; *Weston v. Lumber Co.,* 162 N. C., 165; *Stallings v. Walker,* 176 N. C., 321; *Walker v. Walker,* 185 N. C., 385." See, also, *Bradford v. Bank,* 182 N. C., p. 230.

The general principle of covenants, not discussing partition deeds, is stated in *Baker v. Austin,* 174 N. C., 434, citing numerous authorities, as follows: " 'Where a deed is sufficient in form to convey the grantor's whole interest, an interest afterwards acquired passes by way of estoppel to the grantee.' . . . The general rule is thus stated in 16 Cyc., 689, with full citations in the notes: 'If a grantor having no title, a defective title, or an estate less than that which he assumed to grant, conveys with warranty or covenants of like import, and subsequently acquires the title or estate which he purported to convey, or perfects his title, such after-acquired or perfected title will inure to the grantee or to his benefit by way of estoppel.' "

Ordinarily, "we hear and determine a case here according to the theory upon which it was tried in the court below." *Coble v. Barringer,* 171 N. C., p. 447, and cases cited.

The case was tried out on the theory as set forth in plaintiff's brief: "Where the will or deed provides for a forfeiture in case of breach of

condition, the relief to which the grantee or heirs of devisee is entitled is the recovery of the property. The court will, in so far as it is possible, construe a will according to the intent of the testator. Here these two children were given a larger portion of the estate, and were charged with the support of the mother. The penalty for a failure on the part of either was not left to be found by the court, but was provided in the will—the loss of the land and for the land to go to *'some one who will care for her.'"*

Defendant contends that "the designation of the person to take over is too indefinite." It is not necessary to discuss this question in the decision of the case. The principle is laid down in *Thomas v. Clay*, 187 N. C., p. 783, and cases cited, which hold: "It is well established by an unbroken line of decisions that there must be found within the terms of the declaration of trust a *cestui que trust*, and if there is no certain and complete beneficiary named who may come into a court of equity and claim and establish their right to the fund and to the trust, it will be void for uncertainty. 25 R. C. L., 1189, and cases cited, among others *Witherington v. Herring*, 140 N. C., 497." *Hester v. Hester*, 37 N. C., 330; *Bridges v. Pleasants*, 39 N. C., 26; *Weaver v. Kirby*, 186 N. C., 387; *Ragan v. Ragan*, 186 N. C., 463.

The main and vital contest in this action depends on the meaning of the following words in the will: *"For them both to see that their mother don't suffer their care, if either of them fail to take care of her for their part to go to some one who will care for her."*

It is clear that the husband, W. A. Berrier, though awkwardly expressed, did not want his wife to suffer during her life and her care was left to both plaintiff and David T. Berrier, grantor of defendant. "If either fail their part to go to some one who will care for her." Plaintiff contends that she cared for her mother and her brother and his assignee did not, and therefore, David T. Berrier and his assignee, the defendant, was divested of the title to the land. That the language in the will was a condition subsequent, and her brother having failed to care for her mother, and she having done so, the condition was broken and she was entitled to the land. It is certain by dividing the 200 acres of land between plaintiff and her brother, David T. Berrier, the testator, W. A. Berrier, providing homes for both his children, indicated that both could not give personal care to his wife—both were charged with their mother's care. His wife could not be in two places at the same time, be with his son and daughter both. The liberal and reasonable construction of the intent of testator, in our opinion, was that the land of the one who did not care for her would be charged with the proportionate part of her care. If both failed her, anyone who had

to furnish her care would receive their part—the part of both, rent and land, could be subjected to her care and support. Elizabeth Berrier, the wife, had the right to a sufficient sum out of the rent and land for her reasonable care and support. Plaintiff, in taking her mother to live with her, did nothing more than she was bound to do. She, under the will took her land *cum onere* with the burden to help care for her mother. After taking the mother she could then call upon her brother to contribute his part.

1 Tiffany Real Property, 2 ed., sec. 80, says: "On the principle of hostility to conditions, before referred to, a condition precedent is construed strictly in favor of vesting the estate, *while a condition subsequent is construed strictly against divesting the estate.*" (Italics ours.)

3 Thompson on Real Property (1924), sec. 1970, says: "Conditions subsequent are not favored in law. When the terms of the grant will admit of any other interpretation they will not be held to create an estate on condition. If no words of condition are used, and no words indicating an intention that under any circumstances the estate may be forfeited, or may revert to the grantor or his heirs, or that he or they may reënter and hold the land, and there is nothing in the nature of the acts to be done by the grantee indicating that the estate is to be held upon condition, the deed will be held to convey an estate to the grantee and his heirs forever. The deed will not be held to create an estate upon condition, unless the language to that effect is so clear as to leave no room for any other construction. Thus, where parents conveyed land to their son, reserving to themselves a life estate, and stating in the deed that such son 'is to pay the taxes on said land, and has to support the grantors during their natural lifetime, and at their death the son shall have possession,' the land was not conveyed upon a condition subsequent, because no words of condition were used, and there was no clause of reverter or reëntry, and no intention to create a strict condition can be gathered from the whole instrument. 'To say the stipulation in the deed to pay the taxes and support the grantors is a condition subsequent, the nonperformance of which will defeat the estate granted, is to make a stipulation for the parties which they did not see fit to make for themselves.' "

Plaintiff and defendant's grantor took possession of the land under the will with the burden. They both became bound to care for their mother. The title was vested—there was no condition subsequent. Courts will always construe clauses like the present one, if they can reasonably do so, as a covenant and not a condition, so as to avoid a forfeiture.

3 Thompson, *supra,* part sec. 1976, is as follows: "Upon covenants, the legal responsibility of their nonfulfillment is, that the party violating them must respond in damages. The consequence of the nonfulfillment

of a condition is a forfeiture of the estate. The grantor may reënter at his will and possess himself of his former estate."

We think the position here taken is fully borne out by the decisions of this State. *McNeely v. McNeely*, 82 N. C., 183; *Helms v. Helms*, 135 N. C., 164; rehearing, 137 N. C., 206, and cases cited; *Lumber Co. v. Lumber Co.*, 153 N. C., 49; *Fleming v. Motz*, 187 N. C., 593, and cases cited. The distinction between a covenant, which constitutes a charge on the land, and a condition subsequent, which works a forfeiture, is fully set forth by *Walker, J.*, in *Brittain v. Taylor*, 168 N. C., p. 271. It is further discussed by the same painstaking judge with a wealth of authorities, in *Hinton v. Vinson*, 180 N. C., 393. See, also, *Hall v. Quinn, ante*, 326; *Shields v. Harris, ante*, 520.

In construing the will to ascertain the intention of the devisor, we think that the will did not create a condition subsequent, and the language in no sense, from the facts and circumstances of this case, gave plaintiff the right to recover the land.

Defendant in his answer set up estoppel, as follows: "There was a charge made upon two hundred acres of land, devised to plaintiff and David T. Berrier, with certain provisions in said will for the care of their mother, which provisions appear by reference to said will, and that ever since the said deed was executed to David T. Berrier (this is a mistake from record—David T. Berrier took care of her at old home place about one year, then defendant), defendant has paid each year to the plaintiff such sum as the plaintiff found necessary and proper for him to pay for the care of her said mother, and also paid her doctors' bills, and has fully and amply compensated and settled with the plaintiff for any care her mother was to her, which sums the plaintiff has at all times accepted and received as in full settlement of such care and doctor bills, and the plaintiff is thereby estopped, as well as by her said deed, to make any further claim on account of the said matters referred to in the complaint."

From the construction given of the will that the language was a covenant, the acceptance by plaintiff and her brother, David T. Berrier, of the land, was an agreement to care for their mother. This, as before stated, was a charge on the land. It is not disputed that plaintiff fulfilled her covenant under the deed and cared for her mother. The plaintiff in the complaint demanded judgment for the land and if estopped by her deed to recover the land then for judgment for a certain amount named for the care of her mother to be declared a lien on the land. This amount could only be recovered, if at all, from David T. Berrier and his assignee, the defendant Adam L. Sink, for David T. Berrier's covenant in accepting the land with the charge on his portion to care for his mother. From

the entire record we think plaintiff cannot now recover from David T. Berrier or his assignee, the defendant, Adam L. Sink. The undisputed facts are: W. A. Berrier died 3 May, 1902. Elizabeth Berrier died 27 March, 1924. At the death of W. A. Berrier, his wife, Elizabeth Berrier, lived with David T. Berrier about a year and then she went to live with plaintiff and lived with her until her death. She lived with plaintiff over 20 years. During all those years plaintiff never demanded of her brother, David T. Berrier, or his assignee, Adam L. Sink, more than the amount paid her or indicated in any way that any claim would be made for a larger amount. The mother, the real beneficiary, made no demand.

After plaintiff had taken Elizabeth Berrier to live with her, she being liable for her care as well as her brother, David T. Berrier, she made a deed with the other heirs interested in the land to David T. Berrier for 100 acres, his half, of the land, by metes and bounds and in the deed signed by her, in the covenant clause, after reciting that they were seized of said premises in fee, *"except the interest of Mrs. Berrier under the will."* This same language is used in the deed from David T. Berrier to defendant for 48¼ acres of land of the 100 acres charged with the care of Elizabeth Berrier. Plaintiff testified that defendant, Adam L. Sink, gave her a check for $25 a year. In all he gave her $500 or $600, "he paid in the time he had the land until mother's death." "He paid me $25 and did get up some checks as high as $40. Never more than $40 a year. After the war in 1919, when times went up higher, he got up a little higher." She could read and write and signed her name on the orders—as set forth in statement of this case. Defendant kept a grocery store and plaintiff traded a good deal at the store. David T. Berrier sold 51¾ acres of the 100 acre tract, that had the charge on it to care for his mother, to R. L. McCrary. Plaintiff made no claim on him. "I never asked defendant for anything. He paid me some money every year. Paid the rent. The last check was $60. He paid $50 at one time and $40 at one time." She denied that she agreed with defendant to take $25 a year to take care of her mother.

Defendant testified that after he bought the land he had an agreement with plaintiff to assist in taking care of Elizabeth Berrier, $25 in advance each year. That for 19 years he paid what was required of him. He never paid any rent on the land, but for his part of her mother's expenses. David T. Berrier and W. F. McDonald corroborated defendant. The rental value of the land each year, according to defendant and several witnesses, was $25 a year. Plaintiff testified it was more. The disputed evidence is recited to show the controversy as to the purpose of payment. Elizabeth Berrier died 27 March, 1924. Plaintiff, who could read and write admitted receiving and endorsing the following:

A. L. SINK, *Grocer.* No. 482.

LEXINGTON, N. C., January 19, 1924.

Pay to the order of Bettie Cooke $60.00.
For mother's support in full—paid to January, 1925. A. L. SINK.
To Commercial & Savings Bank, Lexington, N. C.
(Endorsed by Bettie Cook, W. H. Berrier.)

Elizabeth Berrier died 27 March, 1924. Her support was paid in advance for the year. The language of the order was clear and explicit.

Under all the facts and circumstances of this case, we think plaintiff estopped by her acts and conduct to now claim defendant owes her anything. If she had rights, they have been abandoned and relinquished by her conduct—clearly indicating such purpose. She acquiesced in the payments for 19 years and the final amount paid her and receipt order endorsed by her "for mother's support in full—paid to January, 1925." We think the case comes under the principle of *DeLoache v. DeLoache*, 189 N. C., 394, where *Mr. Justice Varser* has ably digested the opinions of this Court on this character of estoppel. At p. 398 the Court says: "When the plaintiff accepted the check with the statement written thereon that it was in full settlement and then cashed the check, he is bound thereby." *Refining Corp. v. Sanders, ante,* 208.

The record discloses that plaintiff for over 20 years took tender care of her mother who died at an advanced age of 88 years. The burden was onerous and exacting—no higher duty can a child perform than that done by this plaintiff for her mother. Her reward is in the commandment: "Honour thy father and thy mother: that thy days may be long upon the land which the Lord thy God giveth thee." This duty she would no doubt have performed alone to this parent, but her father's will gave this tender care to her and her brother and charged certain property left them for this purpose. The defendant, her neighbor, bought her brother's property with her brother's charge on it, and each year he paid plaintiff what she asked, and the last order of payment was "for mother's support in full," which she received and signed for.

We think, the defendant's assignment of error, as follows, should have been granted: "That the court refused at the end of all the evidence to dismiss the action, and for judgment as of nonsuit. The defendant having renewed his motion."

For the reasons given, the judgment below is

Reversed.

ADAMS AND VARSER, JJ., concurring in the result.

We concur in the conclusion reached in the opinion of the Court. We do not concur in the construction of the will and in the reasoning by which this conclusion is reached.

GAITHER GREER v. CALLAHAN CONSTRUCTION CO.

(Filed 9 December, 1925.)

Employer and Employee—Master and Servant—Blasting—Dynamite—Dangerous Instrumentalities—Negligence—Damages.

The contractor for the building of a public highway for the highway commission of a county may not escape liability for the negligent failure of its independent subcontractor to furnish his employee a reasonably safe place to work, and appliances therefor, in the performance of his duty in blasting the roadway when necessary for its completion in accordance with the original contract.

APPEAL by defendant from judgment of ASHE Superior Court, July Term, 1925, *Finley, J.* No error.

Action to recover damages for personal injuries sustained by plaintiff while at work as a laborer in the construction of a public highway in Ashe County.

Defendant, Callahan Construction Company, in November, 1919, entered into a written contract with the highway commission of Ashe County, by which defendant undertook to construct for said highway commission a public highway from Lansing, N. C., up Little Horse Creek, to or near White Oak Schoolhouse. Defendant, thereafter, entered into a contract with E. T. Williams by which the said Williams undertook the construction of a portion of said highway in accordance with the contract between defendant and the highway commission.

Plaintiff was employed by the said E. T. Williams during January, 1921, to do whatever he was directed to do as a laborer in the construction of that portion of said highway which said Williams had undertaken to construct. He had no regular job. He sometimes used a pick and shovel, and sometimes worked at the steam drill. He had occasionally aided in blasting with dynamite. He was subject to the orders of Williams or his foreman.

On or about 27 May, 1921, plaintiff was directed by his foreman to take caps, fuses and dynamite, and "shoot off" thirteen holes which had been drilled within a space about ten feet square, for the purpose of blasting. This blasting was necessary for the construction of said highway, under the contract between defendant and the highway commission. An electric battery by means of which the fuses could be ignited from a distance of a hundred feet or more, had been used on the job for igniting the fuses and exploding the dynamite. On this day, however, the electric battery, under the orders of Williams or his foreman, had been taken to another job. Plaintiff was directed by his foreman to ignite the fuses, and thus explode the dynamite, which he

had placed in said holes, by means of a torch, made of pine bark, upon which oil had been poured. Plaintiff was then about twenty-one years of age, and had had no previous experience in blasting with dynamite. He did as he was directed. As he was raising up to leave the place where the holes had been drilled, after igniting the fuses with the torch, the dynamite in one of the holes exploded and thus injured his eye; he was taken at once to a hospital where, after a few weeks, his eye was removed by a surgeon because of the injury sustained by him as a result of the explosion of the dynamite.

The issues answered by the jury are as follows:

1. Was the plaintiff injured by the negligence of defendant as alleged in the complaint? Answer: Yes.

2. Did the plaintiff by his own negligence contribute to his injury as alleged in the answer? Answer: No.

3. What damages, if any, is the plaintiff entitled to recover of the defendant? Answer: $5,500.

From the judgment upon this verdict, defendant appealed.

T. C. Bowie for plaintiff.

W. R. Baugess, J. B. Councill, S. P. Graves, Manly, Hendren & Womble and R. A. Doughton for defendant.

CONNOR, J. Defendant, by its assignments of error, based upon exceptions duly taken, presents to this Court, upon appeal from the judgment rendered upon the verdict, its contention that although plaintiff at the time of his injury was engaged in work upon the highway which it had contracted to do, and that although such injury was caused by the failure to instruct plaintiff as to the danger of the work which he was directed to do or by the failure to exercise reasonable care to provide for him a reasonably safe place in which to work, or by the failure to exercise reasonable care to provide reasonably safe methods for the performance of his work as a laborer in the construction of said highway, defendant is not liable to plaintiff for damages resulting from his injury because plaintiff was not an employee of defendant but was an employee of E. T. Williams, and that therefore defendant owed plaintiff no duty, the breach of which is alleged in the complaint as the proximate cause of the injury.

After all the evidence had been introduced, defendant admitted that E. T. Williams, by whom plaintiff was employed and under whose direction he was at work when he was injured, was an independent contractor of defendant. Defendant in its answer admitted that it was necessary to use dynamite for blasting in the construction of said highway under its contract with the highway commission of Ashe County.

The question presented by this appeal, therefore, is whether one who has undertaken the construction of a public highway and who has sublet the construction of a portion of said highway to one who by reason of the terms and provisions of the subcontract is an independent contractor, is liable to an employee of such independent contractor who is injured while at work in the construction of said highway, blasting with dynamite, and whose injury is caused by the breach of a duty which, under the law, an employer owes to his employee, it being admitted that in the construction of the highway under the contract, it was necessary to use dynamite for blasting.

The law relative to the duties which a master or employer owes to his servant or employee while engaged in the performance of duties incident to his employment, is well settled in this and other states whose jurisprudence has a common origin and where the growth of the law has been guided by legislation founded upon just principles and has been responsive to judicial decisions influenced by an enlightened social conscience; for "the law is not fossilized; it is a growth. It grows more just with the growing humanity of the age and broadens with the processes of the suns." *Clark, C. J., Pressly v. Yarn Mills,* 138 N. C., 416. By growth and development the law meets the manifest requirements of ever-changing economic and industrial conditions. In his dissenting opinion in *Vogh v. Geer,* 171 N. C., 672, *Chief Justice Clark,* again said: "The modern and just doctrine that when there are large numbers of employees 'the business shall bear the loss' from injury to an employee and that the whole burden shall not fall, as heretofore, with crushing effect upon the unfortunate employee and his dependent family, is now the attitude of the law as it has been expressed by legislation and later by the courts." The law, however, does not hold a master or employer, even of a large number of servants or employees, liable as an insurer. Liability is predicated only upon negligence or breach of duty. Breach of duties by a master or employer resulting as the proximate cause in injuries to the servant or employee, fixes upon the master or employer liability for damages for the injuries sustained by the servant or employee. These duties grow out of and are determined by the relationship; liability for damages caused by a breach of such duties is enforced not only in accordance with correct legal principles, but also in accordance with a sound public policy and in furtherance of an enlightened conception of social justice. However, when the relationship of master or employer and servant or employee does not exist between the person injured and the person upon whom demand for damages is made, there is no liability which the law recognizes and enforces because there is no duty, the breach of which can be assigned as the proximate cause of the injury.

One for whom work is done is not the master or employer of him who has contracted to do the work when by virtue of the terms of the contract, the latter is an independent contractor; nor does the relationship exist between a contractor and his subcontractor when the latter is an independent contractor. An independent contractor has been defined as one who exercises an independent employment, contracts to do a piece of work according to his own judgment and methods and without being subject to his employer except as to the results of the work and who has the right to employ and direct the action of the workmen, independently of such employer and freed from any superior authority in him to say how the specified work shall be done or what the laborers shall do as it progresses. *Craft v. Timber Co.*, 132 N. C., 151; *Young v. Lumber Co.*, 147 N. C., 26; *Gay v. R. R.*, 148 N. C., 336; *Denny v. Burlington*, 155 N. C., 33; *Johnson v. R. R.*, 157 N. C., 382; *Hopper v. Ordway*, 157 N. C., 125; *Harmon v. Contracting Co.*, 159 N. C., 22; *Embler v. Lumber Co.*, 167 N. C., 457; *Vogh v. Geer*, 171 N. C., 672; *Gadsden v. Craft*, 173 N. C., 418; *Simmons v. Lumber Co.*, 174 N. C., 220; *Cole v. Durham*, 176 N. C., 289; *Aderholt v. Condon*, 189 N. C., 748; *Paderick v. Lumber Co., ante*, 308.

The owner, for whom work is done under a contract, does not owe to employees of his independent contractor, as thus defined, the same duties which a master or employer owes to his servant or employee; nor does a contractor owe such duties to employees of his subcontractor when by the terms of the subcontract the latter is an independent contractor. The relationship between the owner and such employees or between the contractor and such employees is not that of master and servant. It is well settled, therefore, as a general rule, that neither the owner nor the original contractor is liable for the negligence of an independent contractor which results in injury to an employee or servant of the latter. 14 R. C. L., pp. 79, 80, and cases cited. "Where the contract is for something that may be lawfully done and is proper in its terms and there has been no negligence in selecting a suitable person to contract with in respect to it, and no general control is reserved either in respect to the manner of doing the work or the agents to be employed in it and the person for whom the work is to be done is interested only in the ultimate result of the work, and not in the several steps as it progresses, the latter is not liable to third persons for the negligence of the contractor as his master." Cooley on Torts, 2 ed., sec. 548, p. 646. "An independent contractor is one who undertakes to produce a given result but so that in the actual execution of the work he is not under the order or control of the person for whom he does it and may use his own discretion in things not specified beforehand. For the acts or

omissions of such a one about the performance of his undertaking, his employer is not liable to strangers." Pollock on Torts, 12 ed., p. 80.

The rule exempting an owner or contractor from liability for the negligence of an independent contractor to a stranger or third person does not necessarily exempt such owner or contractor from liability to the servant or employee of the independent contractor who is injured while engaged in work for the ultimate benefit of such owner or contractor. There is a relationship between the owner or contractor and the servant or employee of the independent contractor which may impose upon the former duties which the law does not impose upon him with respect to strangers or third persons. The law would not be just to itself or to those who have a right to rely upon it for protection, if an owner or contractor could, in all cases, by committing the work in which he is interested to an independent contractor, secure absolute exemption from all liability to those who by their labor and by methods and under circumstances contemplated when the original contract was made, contribute to its full performance.

It is therefore conceded that upon grounds of public policy as well as of justice to individuals, certain exceptions must be made to the general rule exempting owners or contractors from liability for the negligence of an independent contractor. It is by exceptions to general rules that the law adapts itself to the facts of particular cases in order that the enforcement of general rules, just as they may be when applied to general conditions, may not by disregarding the facts of particular cases, cause injustice to be done. "Where the thing contracted to be done is necessarily attended with danger, however skillfully and carefully performed, or is intrinsically dangerous, it is held that the party who lets the contract to do the act cannot thereby escape responsibility for any injury resulting from its execution, although the act to be performed may be lawful. But if the act to be done may be safely done in the exercise of due care, although in the absence of such care, injurious consequences to third persons would be likely to result, then the contractor alone is liable, provided it was his duty under the contract to exercise such care." *Engle v. Eureka Club,* 13 N. Y., 100; *Young v. Lumber Co.,* 147 N. C., 26.

In *Paderick v. Lumber Co., ante,* 308, it was held by this Court that an owner who furnished defective machinery to its independent contractor, whose employee was killed by the operation of such defective machinery, was liable to the administratrix of such employee for damages. *Clarkson, J.,* in the opinion for the Court, says: "Under all the facts and circumstances of this case, defendant having agreed with L. L. Paderick (who was found by the jury to be an independent contractor) to furnish the loader, in so far as L. L. Paderick and those in his employ

are concerned, in the operation of the loader, the principle of master and servant was applicable." It was held that the defendant owed to the employee of the independent contractor the duties prescribed by law to be observed by a master to a servant.

In *Williams v. Lumber Co.,* 176 N. C., 174, the defense based upon defendant's contention that the injury was the result of the negligence of an independent contractor was held unavailing to defendant, *Walker, J.,* saying: "The Camp Company was authorized to do the work in this way, by using an engine—a dangerous instrumentality—and even if an independent contractor, as contended by defendant, it would still be liable for his acts and the damage which was caused by his acts."

In *Cole v. Durham,* 176 N. C., 289, it is said: "Conceding for the sake of argument, that but for the nature of the work to be done he would be an independent contractor and liable solely for his own negligence, we are of the opininon that the work was of a hazardous character or inherently dangerous, as it is said, and that such a plea does not avail the power company."

The principle as stated in *Davis v. Summerfield,* 133 N. C., 325, is that a man who orders a work to be executed, from which in the natural course of things, injurious consequences to others might be expected to arise, unless means are adopted by which such consequences may be prevented, is bound to see to the doing of that which is necessary to prevent the mischief, and cannot relieve himself of his responsibility by employing some one else—whether it be the contractor to do the work from which the danger arises, or some independent person—to do what is necessary to prevent the act he has ordered to be done from becoming wrongful. There is an obvious difference between committing work to a contractor to be executed, from which if properly done, no injurious consequences can arise, and handing over to him work to be done from which mischievous consequences will arise unless preventive measures are adopted.

Defendant, having undertaken the construction of the highway, with knowledge that it would be necessary to use dynamite for blasting, in performing the work, is not relieved of liability for damages to plaintiff, who was wrongfully injured, while blasting with dynamite, because plaintiff was an employee of an independent contractor, who by his contract undertook to do the work, by blasting with dynamite. Under all the facts and circumstances of this case, as said in *Paderick v. Lumber Co., supra,* defendant having procured E. T. Williams to do the work, which required the use of dynamite—a dangerous instrumentality —stood in the relation of master and servant to plaintiff, an employee of Williams, while engaged in such work, with the instrumentality contemplated when defendant entered into the contract with the highway

commission. Defendant owed to plaintiff the duties growing out of that relationship, and is liable to plaintiff for damages resulting from injuries caused by breach of such duties. Defendant, having undertaken the construction of the highway, with knowledge that blasting by dynamite was necessary to perform the work under its contract, is not relieved of liability to a laborer, who is injured while engaged in such work, with the dangerous instrumentality contemplated and necessary, because such laborer was an employee of an independent contractor of defendant, whose negligence was the proximate cause of the injury.

We have examined each of the assignments of error based upon exceptions taken by defendant during the progress of the trial. These assignments of error cannot be sustained. The judgment must be affirmed. There is

No error.

STATE EX REL THE BOARD OF COMMISSIONERS OF MOORE COUNTY, v. DANIEL ALPHONSO BLUE, McI. KENNEDY, C. C. FRY, J. TALBOT JOHNSON, J. M. BROWN, N. J. CARTER, M. A. MONROE, RAEPHAEL W. PUMPELLY, W. C. BROWN, S. G. GARNER, C. F. GARNER, M. C. McDONALD, W. L. HOLIDAY, W. A. BLUE, S. F. COLE, J. McN. JOHNSON, ALEX. H. McLEOD, GEORGE W. McNEILL, H. A. PAGE, JR., J. F. ALLRED, R. G. FARRELL, J. R. PAGE, A. CAMERON, RALEIGH BREWER, W. T. BROWN, M. McL. McKEITHEN, LEONARD TUFTS, W. H. CURRIE, J. L. DOWD, W. M. FIELDS, B. D. DOWD, W. J. WADSWORTH, AND W. G. TYSON.

(Filed 9 December, 1925.)

1. **Taxation—Counties—Sheriffs—Settlement—Counterclaim.**

   It is against sound policy to permit a sheriff to plead a counterclaim or set off against his settlement with the county in accordance with tax books given into his hands and certified for the purpose of collection, such sums as he deems to have been erroneously placed thereon.

2. **Same—Contracts.**

   Taxes are not debts existing by contract, but collectible by the counties under the exercise of their governmental functions and for their existence.

3. **Statutes — Recoupments — Offset — Counterclaim—Actions—Common Law.**

   Recoupment and set-off, and counterclaim which is of a broader scope, are creatures of statute unknown to the common law.

4. **Taxation—Sheriffs—Tax Books—Settlement—Estoppel.**

   A sheriff who has received the certified tax books for the collection of taxes, is estopped to deny the validity of the taxes as therein assessed, after he has assumed to act accordingly.

5. Statutes—Interpretation—Retroactive Statutes—Taxation.

A statute which changes the law theretofore existing in permitting the sheriff to plead a counterclaim as to the settlement of his taxes according to the certified tax books he has received from the county for the purpose, and expressing that it was to be in force from and after its ratification, cannot be construed to have a retroactive effect.

6. Same—Sheriffs—Settlement of Taxes.

Chapter 254, Public Laws of 1925, expressly permitting a sheriff to plead a counterclaim in his settlement for taxes, covers specific errors and mistakes made against ex-sheriffs or tax collectors, and being expressly prospective in effect, is unavailable as a counterclaim for the settlement of taxes collected for preceding years by the same sheriff.

7. Statutes—Retroactive Statutes—Interpretation—Presumptions.

For the courts to declare a statute retroactive in effect, the legislative intent as therein expressed must be clear and unmistakable, the presumption being to the contrary.

8. Taxation—Discretion of Court—Safe-Keeping of Tax Books—Appeal and Error.

In an action by a county to recover from a sheriff a balance due upon the tax book certified and delivered to him, it is within the sound discretion of the trial judge to order the tax list deposited in a fire-proof vault of the county to be available to the inspection of the parties and the public, retaining the cause for further and appropriate orders as conditions may require.

APPEAL by defendant from MOORE Superior Court. *Bryson, J.*

Action to recover balance due on tax lists certified to defendant Blue, sheriff. From a judgment sustaining plaintiff's demurrer to counterclaim defendants appeal. Affirmed.

The plaintiff alleged the levy of taxes for 1922, for its several purposes in the sum of $276,292.23, and that these lists were duly certified to the defendant, Daniel Alphonso Blue, sheriff, for collection, and that he had failed to pay the plaintiff, or to receive credit for a balance thereof in the aggregate sum of $56,283.70 with interest on $36,720.35 thereof at 2 per cent per annum from 30 September, 1924, and interest on $20,563.35 thereof at 6 per cent from 30 September, 1924, (said date being the date of the institution of this action).

The defendant sheriff denied the amount of plaintiff's claims, and alleges his willingness to settle and pay the correct amount due plaintiff, but set up that there had been no settlement in reference to the taxes for 1922, and no demand on defendant, Daniel Alphonso Blue, sheriff, therefor. The defendants further alleged special errors in paying over taxes in 1918, 1919, 1920, 1921, each year, in the sum of $5,000, and during the years 1921 and 1922, the plaintiff wrongfully charged in the tax list $6,450, comprised of items of taxes levied on "foreign stock"; that is, stock owned by residents of Moore County in corporations of other

states, and that he was entitled in the 1922 settlement to recover $2,400 over payment.

To this counterclaim, plaintiff demurred as follows:

"1. That the said defendant sheriff, under the laws of this State, cannot plead any special error against him in the settlements of the taxes of 1918, 1919, 1920 and 1921, or special error in the settlement for either of said years, as a set-off, counterclaim or recoupment in this action brought against him by plaintiff for taxes collected, due and owing by him to plaintiff for the year of 1922.

"2. That plaintiff's cause of action herein does not arise upon contract but is based upon the duty of the defendant sheriff to collect and account to the plaintiff for the county's moneys which he has collected as its agent for the year 1922, and should have in hand, and the same is not under the laws of this State subject to set-off, counterclaim or recoupment for special errors in settlements for said years of 1918, 1919, 1920, and 1921."

Plaintiff further demurred to the offset, counterclaim and recoupment set up by defendant sheriff, with reference to the item of $6,350, which the said sheriff says was wrongfully charged against him, as follows:

"1. That plaintiff's demands in this action for 1922 taxes, cannot be offset, counterclaimed or in anyway reduced by plea of any special error in the settlement of 1921 taxes charged against said defendant sheriff on foreign corporate stock, whether collected by said sheriff or not.

"2. That under the Constitution and laws of the State the county of Moore was, in 1921 and 1922, required, to levy taxes on and against foreign corporation stock held in Moore County, and the said sheriff is not entitled to relief on account thereof, except in such cases as the board of commissioners of said county may have granted relief."

On 14 February, 1925, an order was entered, directing that the tax lists or tax books of Moore County, endorsed by the board of commissioners to the defendant sheriff for the collection of the public taxes for the years 1918, 1919, 1920, 1921 and 1922, be filed for safe-keeping in the fire-proof vaults in the office of the register of deeds for Moore County, as public records of said office. The purpose of this order is thus stated: "Where the same may be accessible to the public and the parties to this action."

The defendant sheriff appealed from this order.

This action was instituted against the defendant, Daniel Alphonso Blue, sheriff of Moore County, and the other defendants who are his bondsmen.

R. L. Burns for plaintiff.

Siler & Barber and Hoyle & Hoyle for defendants.

VARSER, J. Defendants' appeal presents two questions: (1) Whether the pleaded counterclaim is available as such in this action; and (2) whether there was error in the order with reference to the safe-keeping of the tax list.

We are clearly of the opinion, and so hold, that at the time of the hearing at February Term of Moore Superior Court, 1925, the pleaded counterclaim was not good against the demurrer and was not available to the defendant in any respect as a bar to the suit of Moore County to compel the defendant sheriff to make settlement, as required by law, of the taxes represented by the tax list and duly certified to him, as allowed by law. *Battle v. Thompson*, 65 N. C., 406; *Cobb v. Elizabeth City*, 75 N. C., 1; *Gatling v. Comrs.*, 92 N. C., 536, 539; *S. v. Georgia Co.*, 112 N. C., 34; *Comrs. v. White*, 123 N. C., 534; *Wilmington v. Bryan*, 141 N. C., 666; *Graded School v. McDowell*, 157 N. C., 316, 317; Cooley on Taxation, 15, 16. This question is squarely presented in *Comrs. v. Hall*, 177 N. C., 490, when the Court upheld a demurrer against a counterclaim, such as has been pleaded in the instant case. As stated by *Brown, J.*, in *Wilmington v. Bryan, supra*: "No counterclaim is valid against a demand for taxes." And, in the same case, *Walker, J.*, concurring as to this proposition, says: "Neither a taxpayer nor a sheriff can plead a set-off in a suit against him for taxes due and owing. . . . This is so upon the ground of public policy. To permit a taxpayer or an officer charged with the collection of taxes to set up an opposing claim against the State or the city might seriously embarrass the Government in its financial operation by delaying the collection of taxes to pay current expenses." This reasoning applies with equal force to a county which has, necessarily, made its levy for the respective years mentioned in the counterclaim, upon the then needs of the county government, and to allow a counterclaim collected through the years against the settlement sued for, might result in much embarrassment to the county and its taxpayers. Taxes are not debts resting upon contract or upon the consent of the taxpayers, and are not debts in the ordinary sense of the word, and to hold that a tax is liable to set-off would be subversive to the power of government and destructive for the purpose for which the tax is levied. *Gatling v. Comrs., supra.*

"Recoupment" and "set-off," unknown at common law, are creatures of the statute. *Electric Co. v. Williams*, 123 N. C., 51; *Boyett v. Vaughan*, 85 N. C., 363. Counterclaim is broader and embraces recoupment and set-offs, but exceeds them both. It was unknown in this State until the Code of Civil Procedure was adopted. *Valentine v. Holloman*, 63 N. C., 475; *Teague v. James*, 63 N. C., 91; *March v. Thomas*, 63 N. C., 87; *Electric Co. v. Williams, supra; Bank v. Wilson*, 124 N. C., 562, 570; 24 R. C. L., 792 *et seq.*

The counterclaim, wherein the defendant sheriff seeks to challenge the right and power of the commissioners of Moore County to levy a tax on shares of stock in foreign corporations, is not available to defendants for two reasons:

(1) Prior to the adoption of the Revenue Act of 1923, sec. 4, such a tax was authorized and directed to be levied. Public Laws 1921, ch. 38, sec. 40, with necessary machinery for fixing values prescribed therein. *Worth v. Comrs.*, 82 N. C., 420; *Worth v. Comrs.*, 90 N. C., 409; *Redmond v. Comrs.*, 106 N. C., 122. An interesting discussion of this and similar tax legislation appears in *Person v. Watts*, 184 N. C., 499, and in *Person v. Doughton*, 186 N. C., 723. County commissioners have no power to release from taxation property subject thereto. C. S., 7976. *Lemley v. Comrs.*, 85 N. C., 379. The Legislature has no power to compel a return of taxes legally collected. *Bailey v. Raleigh*, 130 N. C., 209.

(2) The defendant sheriff is estopped to question the authority of the commissioners to levy the taxes certified to him when the tax lists have been received by him and he has acted under them. *S. v. Woodside*, 31 N. C., 496; *McGuire v. Williams*, 123 N. C., 349.

Defendants, however, claim that whatever was the status of their pleaded counterclaim, when the judgment on the demurrer was rendered, that on 10 March, 1925, chapter 254, Public Laws 1925, was ratified by the Legislature and that this act expressly permits the pleaded counterclaim. This act is broad enough to cover specific errors and mistakes made against "ex-sheriff" or "ex-tax-collector." The county commissioners are given authority to correct such errors and give him credit when he goes out of office, and it provides that an action for the settlement of taxes, such errors and mistakes, shall be allowed as set-offs or counterclaims against any amount that he may owe at that time.

Section 3 of this act is in usual form as follows: "That this act shall be in force from and after its ratification." (10 March, 1925.)

Defendants contend that this act is both prospective and retroactive. Although enacted pending this appeal, they contend that this Court must necessarily reverse the judgment sustaining the demurrer and permit the counterclaim to avail if supported by proper proof.

Statutes ought not to act retrospectively and will not be so construed unless their terms require it. *S. v. Littlefield*, 93 N. C., 614. A plain expression of legislative intent, that it shall have retroactive effect, is necessary. *Leak v. Gay*, 107 N. C., 481. Statutes are not to be given retroactive effect when such a construction would interfere with vested rights (*Lowe v. Harris*, 112 N. C., 489), or would interfere with judgments already rendered (*Morrison v. McDonald*, 113 N. C., 327). A power to open or vacate judgment is essentially judicial, and since one of the great constitutional principles underlying our government, is the

separation of the powers and functions of the three departments of the government, legislative, executive and judicial, we will not construe an act of the Legislature to have this intent, unless it clearly appears in the act itself. Black on Judgments, 2 ed., paragraphs 298, 455. Freeman on Judgments, 5 ed., 395, 396; *S. v. Wildes*, 34 Nev., 94; *Gilman v. Tucker*, 128 N. Y., 190; *McCulloch v. Virginia*, 172 U. S., 102; *S. v. Wheeling and Belmont Bridge Co.*, 18 Howard, U. S., 421; *S. v. Klein*, 13 Wallace, U. S., 128; Cooley's Constitutional Limitations, 94; *Arnold v. Kelly*, 5 West Va., 446.

It would not be fair or respectful to a coördinate branch of the government to assume that it intended to exceed its powers or to interfere with rights already adjudicated or to interfere with the financial condition of counties and seriously interfere with their function, when it has expressly stated that "this act shall be in effect from and after its ratification," thereby expressly negativing a retroactive intent, nothing else appearing. "There is always a presumption that statutes are intended to operate prospectively only, and words ought not to have a retrospective operation unless they are so clear, strong and imperative that no other meaning can be annexed to them, or unless the intention of the Legislature cannot be otherwise satisfied. Every reasonable doubt is resolved against a retroactive operation of the statute. If all the language of a statute can be satisfied by giving it prospective action, only that construction will be given. Especially will a statute be regarded as operating prospectively when it is in derogation of the common-law right or the effect of giving it retroactive operation will be to destroy a vested right or to render the statute unconstitutional." 25 R. C. L., 787; Black on Interpretation of Laws, 252; *Hicks v. Kearney*, 189 N. C., 316, 319; *Waddill v. Masten*, 172 N. C., 582; *Mann v. Allen*, 171 N. C., 219; *Elizabeth City v. Comrs.*, 146 N. C., 539; *Stephens v. Hicks*, 156 N. C., 239, 245; *Jones v. Schull*, 153 N. C., 517; *Greer v. Asheville*, 114 N. C., 678; *Woodley v. Bond*, 66 N. C., 396.

The defendants, however, rely upon *Brinson v. Comrs.*, 173 N. C., 137, and *Wikel v. Comrs.*, 120 N. C., 451. These cases widely differ from the instant case. In *Brinson v. Comrs., supra*, plaintiffs, citizens of Duplin County, sought a mandamus to compel the building of fences, around the county and certain territory therein, under chapter 512, Laws of 1915, and pending the defendants' appeal, the Legislature repealed the specific statute sued upon and the action abated because the act upon which it existed ceased to exist. In *Wikle v. Comrs., supra*, a mandamus was sought to compel the building of a bridge over the Tuckaseegee River as required by chapter 12, Acts 1895. Pending the appeal, the Legislature repealed chapter 12, Acts 1895 and the action abated, because it had no basis upon which to exist. In the case at bar

no legislation affecting plaintiff's rights to sue has been enacted since the action was instituted, but the act of 10 March, 1925, relied upon by defendants, allows set-offs and counterclaims not theretofore allowed, and is prospective only, and does not apply to, or affect, the judgment sustaining the demurrer. Since this statute, chapter 254, Public Laws 1925, appears, upon first impression, to be subversive of the unbroken line of decisions in this State since the beginning of its government, we are comforted in the fact that it is prospective, and not before us for interpretation or enforcement.

The defendants also appeal from the order of *Bryson, J.*, requiring the tax list to be deposited in the fire-proof vault of Moore County in the register's office, for the protection of the public and the parties to this action, with express provision of accessibility to all persons interested. This is in the discretion of the court and well within its power and no facts are presented in the record tending to show that this order will prejudice the rights of any party or that the facts did not support the order. Courts do not presume error. It must affirmatively appear. *Perry v. Surety Co., ante,* 284, 292.

The exception to this order is not sustained. If, at any time, during the progress of this suit, the rights of the parties, or their convenience in preparing for the trial of this cause shall necessitate a change in, or modification of, this order, relief may be had upon motion to the judge.

Let it be certified that the judgment and order appealed from are

Affirmed.

L. L. MOSS v. BEST KNITTING MILLS.

(Filed 9 December, 1925.)

1. Evidence—Contracts—Breach—Experience.

In an action by a contractor to recover the balance of the contract price for supervising and conducting the erection of a building, where the defendant pleads and offers evidence to show a breach thereof by plaintiff, defendant's evidence as to his experience is competent as to his skill and intelligence to perform his contract, as corroborative evidence of his denial of negligence and incompetence, though incompetent as to good character upon a charge of fraud, or as a defense in wrongful arrest.

2. Same—Appeal and Error.

Where evidence is competent in part, a broadside exception will not be sustained on appeal.

3. Contracts—Performance—Evidence—Acceptance.

Parol evidence is competent to prove that the owner of a building contracted to be erected, accepted the building with full knowledge of its

condition, where the contractor sues for the balance of the contract price, and the owner defends upon the ground that the plaintiff failed to erect the building as the contract required.

4. Same—Waiver.

Acceptance of a building under contract implies the owner's satisfaction therewith, and is a waiver of many rights.

5. Evidence—Cross-Examination.

The right of a party to cross-examine witness upon the trial, is among other things, to afford him protection against the conclusion of a witness which he has stated as a fact.

6. Contracts—Damages—Evidence—Appeal and Error.

Where a contractor to furnish labor and material and supervise construction of a building to be used as a yarn mill, sues to recover the balance due him under the contract: *Held*, under the facts in this case, evidence of defendant's loss from damage to yarns caused by a leak in the roof, etc., was properly excluded.

7. Contracts—Buildings—Skill Required.

It is the duty of the contractor for the erection of a building to use ordinary skill only in its construction, unless a greater degree of skill is specially provided for by the contract.

8. Same—Substantial Performance—Damages.

Where a contractor for the erection of a building has substantially complied with his contract, and the owner has accepted same, he is liable only as to minor details, under the contract in the instant case, the cost of putting the building in proper condition required by the contract.

APPEAL by defendant from CATAWBA Superior Court. *Stack, J.*

Action to recover balance due on a building contract. From a judgment in favor of plaintiff, and that defendant take nothing on his counterclaim, defendant appealed. No error.

The parties admitted the contract in the pleadings as follows: "That the defendants being desirous of enlarging its manufacturing plant, contracted with the plaintiff to furnish the material and perform the work and agreed to pay the plaintiff the price of the labor and material plus ten per cent for his personal supervision." Plaintiff claimed a balance due on this contract, and defendant denied that plaintiff had performed the contract, and alleged damages on account of his failure to discharge his duty the defendant had suffered damages.

The jury returned the following verdict:

"1. In what amount, if any, is the defendant indebted to the plaintiff for labor, materials and supervision of work? Answer: $918.

"2. In what amount, if any, is plaintiff indebted to the defendant on its counterclaim? Answer: None."

M. H. Yount and A. A. Whitener for plaintiff.

John C. Stroupe and Self & Bagby for defendant.

VARSER, J. The plaintiff contended that he had performed the contract on his part, with reasonable skill, and in a workman-like manner, and that whatever defects that may have later appeared, he offered, with dispatch, to remedy, and that all building, both as to labor and material, was done under the personal observation of one of defendant's owners, one Hollar, and that the building was, when completed, accepted, and payments made to him, and the reason first given for not paying the balance was that the defendant did not have enough money.

The defendant insisted that the work was done in a negligent manner and that plaintiff knew when he entered into the contract that the building, an addition to a knitting mill, was to be used for mill purposes, and that heavy and valuable machinery would be put therein. Defendant also contended that the wall gave way; the roof leaked and damage had resulted therefrom.

Defendant's first assignment of error is to the admission in evidence from plaintiff the statement "that he (plaintiff) does a volume of $125,000 worth of business a year."

Plaintiff is a building contractor. He further says: "I live at Hickory, N. C. I have lived there 39 years. My work during that time has been carpenter's work, and construction. In connection with this construction work, I run a lumber plant and planing mills. I do furnish the material for the houses I build."

The defendant's exception does not single out the statement as to volume of business. This is not evidence of good character as a defense to a charge of fraud (*Norris v. Stewart,* 105 N. C., 455; *Lumber Co. v. Atkinson,* 162 N. C., 298), nor as a defense in wrongful arrest (*Sigmon v. Shell,* 165 N. C., 582, 586), nor is it evidence of reputation as to skill and intelligence, as in case of a civil engineer who directed the building of a culvert (*Emry v. R. R.,* 102 N. C., 209, 227). It was not offered to prove good character or reputation. For that purpose it is clearly incompetent. We think, however, the evidence competent for the jury to consider in determining the weight to be given the plaintiff's testimony as to his performance of the contract. Experience frequently differentiates the probative value of one witness from that of another. It shows his "experiential capacity." Wigmore on Evidence, 2 ed., secs. 555 *et seq.*

Assignment No. 2 is to the admission of the testimony of plaintiff that Lon Hollar "accepted" the building, and to the charge giving plaintiff's contention that he put up the building and there was no "kick" on the material, and when he rendered his itemized statement, the prices were not objectionable to defendant. Lon Hollar was one of the owners of the defendant, in charge of its business. Acceptance may be thus proved: It is a fact, with a mental act of intent to receive as one's own,

or for the owner, as a compliance with the required duty of the offerer—here the builder. Black's Law Dict., 2 ed., 12. It may relate to a building, or personal property, or other thing which is offered actually or constructively. *Rodgers v. Phillips*, 40 N. Y., 524; *Snow v. Warner*, 10 Metcalf (Mass.), 132. Receiving the building was an acceptance in *Pipkin v. Robinson*, 48 N. C., 152. Acceptance may be expressed or implied from the conduct of the owner. *Cigar Co. v. Wall Paper Co.*, 164 Ala., 547, 560; *Walstron v. Construction Co.*, 161 Ala., 608, 618; *Walters v. Harvey*, 8 Del., 441; *Palmer v. Meridien*, 188 Ill., 508; *Bozarth v. Dudley*, 44 N. J. L., 304; *Otis Electric Co. v. Flanders Realty Co.*, 244 Pa., 186. The owner may by word, or act, or failure to act or speak, accept. *Walstron v. Construction Co., supra.* Whether it is an acceptance is generally a question of fact (*Gray v. James*, 128 Mass., 110; *Fuller v. Brown*, 67 N. H., 188; *Colby v. Franklin*, 15 Wis., 311), and therefore probable by parol evidence. The right of cross-examination is protection to the adverse party against a statement of a conclusion, and not a fact. The ruling as to evidence, and the charge are correct. Acceptance implies satisfaction and waives many rights. 9 C. J., 796.

The defendant's assignments of error 3 and 4, are directed to the court's refusal to admit evidence as to defendant's loss from damage to yarns due to a leak in the roof, waste of material and injury to machine on account of effect of sinking of building, and the loss of profits.

The contract was that plaintiff furnish labor and material and supervise construction. No architect's plans and specifications were had.

Lon Hollar testified: "I was there sometime during every day, that is, every day part of the time, and some days all day. I was manager of the mill. I am over the superintendent. I am the owner. I was there and saw the work going on and saw some of the material being used. I could have seen all of it. I saw the men that worked there. I saw when they came and what they were doing. Mr. Fry did the grading for the foundation for me. There was an old cesspool where the building is. Mr. Fry covered up the cesspool. There was concrete around it. I did not think that that would be liable to sink. Mr. Moss said he would fix that. Sure, I know it was there and knew they were covering it up. He (Mr. Fry) did the grading for me. That is where one of the pillars is that sank, but there are several other pillars that sank."

He further says: "After the building was completed and Mr. Moss left there, we moved the machinery in. I don't know what caused the roof to leak."

We do not think the contract and these facts present any legal basis for the testimony offered.

The court charged that it was plaintiff's duty to use ordinary skill in the construction and that if he failed in this respect, defendant would be entitled to recover the cost of putting the building in proper condition.

It is the duty of the builder to perform his work in a proper and workman-like manner (*Byerly v. Kepley,* 46 N. C., 35; *Electric Supply Co. v. Electric Light Co.,* 186 Mass., 449; *Gettis v. Cole,* 177 Mass., 584; *Smith v. Clark,* 58 Mo., 145; *Gwinnup v. Shies,* 161 Ind., 500; *Mayer Ice Machine Co. v. Van Voorhis,* 88 N. J. L., 7). This means that the work shall be done in an ordinarily skillful manner, as a skilled workman should do it (*Fitzgerald v. LaPorte,* 64 Ark., 34; *Ideal Heating Co. v. Kramer,* 127 Iowa, 137, 9 C. J., 750). There is an implied agreement such skill as is customary (*Somerby v. Tappan,* Wright (Ohio 229), will be used. In order to meet this requirement the law exacts ordinary care and skill only. *Doster v. Brown,* 25 Ga., 24; *Whitcomb, v. Roll,* 81 N. E., 106; *Ind. School Dist. v. Swearngin,* 119 Iowa, 702; *Peacock v. Gleesen,* 117 Iowa, 291 (only reasonable diligence in drilling well); *Hartford Co. v. Tobacco W. Co.* (Ky), 121 S. W., 477; *Giles v. Robinson,* 114 Maine, 552; *Cunningham v. Hall,* 4 Allen (Mass.), 268; *Holland v. Rhoades,* 56 Oreg., 206; *Fletcher v. Seekel,* 1 R. I., 267; *Stanton v. Dennis,* 64 Wash., 85. Manner of best builders not required in absence of specifications (*Blodgett Const. Co. v. Lumber Co.,* 129 La., 1057). Measured by the rule clearly deducible from the foregoing authorities, we hold that the challenged rulings of the trial court are correct.

Under instructions, free from error, the jury has necessarily found that plaintiff has performed his contract, both substantially and fully. The foundation was laid under defendant's observation and where he had excavated for it. If the old cesspool was not a proper place to put the wall foundation, the plaintiff could not be held liable therefor when he did not select the foundation site, but used the excavated foundation as selected and excavated by the defendant.

The instructions were not contradictory. The roof might leak, and the windows might not now fit properly, and the house may have sunk on account of the giving way of the soil where the old cesspool was, regardless of the skill and diligence of the plaintiff. This was the view submitted in the charge and the evidence supports this view.

The reasonable cost of the labor to remedy any defects for which plaintiff was responsible was the correct rule under the instant contract. The building had been taken and put to use by defendant. It was certainly substantial compliance on plaintiff's part on defendant's own testimony. *Poe v. Brevard,* 174 N. C., 710; *Pinches v. Church,* 55 Conn., 183; *Smith v. Gugerty,* 4 Barb. (N. Y.), 614; *Carroll v. Welch,* 26 Tex., 147; *Woodruff v. Hough,* 91 U. S., 596; *Mitchell v. Caplinger,* 97 Ark.,

278; *Connell v. Higgins*, 170 Cal., 541; *Chariott v. McMullen*, 84 Conn., 702; *Finegan & Co. v. L'Engle & Son*, 8 Fla., 413; *Erikson v. Ward*, 266 Ill., 259; *White v. Oliver*, 36 Maine, 92; *Hennessey v. Preston*, 219 Mass., 61; *Strome v. Lyon*, 110 Mich., 680; *Crouch v. Gurmann*, 134 N. Y., 45; *Russell v. Comrs.*, 123 N. C., 264; *Twitty v. M'Guire*, 7 N. C., 501.

This rule of "substantial compliance" is only applied when a builder has undesignedly violated the strict terms of his contract, and the owner has received and retained the benefit of the builder's labor and material, and the builder is ready to remedy. The defects must be trivial and slight, such as are covered by the maxim *de minimis non curat lex*. The owner is entitled to damages by reason of the failure to perform strictly. *Howie v. Rea*, 70 N. C., 559; *Crouch v. Gurmann, supra; Bergfores v. Caron*, 190 Mass., 168. His damages is the cost of material and labor (in the instant case labor only) in putting the structure in condition called for by the contract. Since no specific condition was called for in the contract sued on, a result such as ordinary care and skill in supervising would produce was contemplated. *Mitchell v. Caplinger, supra; Morehouse v. Bradley*, 80 Conn., 611; *Cullen v. Sears*, 112 Mass., 299; *Phelps v. Beebe*, 71 Mich., 554; *Crouch v. Gurmann, supra; Filbert v. Philadelphia*, 181 Pa., 530; *R. R. Co. v. Howard*, 13 How. (U. S.), 307; *Graves v. Allert & Fuess*, 142 S. W., 869, 39 L. R. A. (N. S.), 591, note.

The owner was advertent to the entire course of construction and the jury was within the evidence if it found the owner's consent applied to the causes of the defects.

We have examined all the exceptions and none of them show prejudicial error. The charge fairly presented every contention of the parties. The controversy was largely in the domain of fact. We find in the trial

No error.

A. S. CAMPBELL, ADMINISTRATOR OF RICHARD S. SAMS, v. MODEL STEAM LAUNDRY.

(Filed 9 December, 1925.)

1. Negligence—Charter.

A child under four years of age is incapable of negligence, primary or contributory.

2. Same—Automobiles—Municipal Corporations—Traffic Ordinances.

Where the driver of an electric truck, in the performance of his duty to his employer, leaves the truck parked on the side of a frequented street, in violation of a city ordinance, with the electric plug in and

brakes unset so that it could readily be started, the owner is liable for the death of a child four years of age who climbed upon the wheel of the truck, started it in operation, and was thrown thereby to his death.

3. Same—Proximate Cause.

The violation of a city ordinance in parking a truck on the wrong side of a street, while negligence *per se*, the negligence must be the proximate cause of the injury alleged in order to sustain an action for damages.

4. Same—Attractive Nuisance.

An electric delivery truck is not an "attractive nuisance," but a recovery may be had when it is negligently left on a city street ready to start, and a child of tender years sets it going and its death is thereby proximately caused, under circumstances from which the result should have reasonably been anticipated in the exercise of ordinary care.

5. Appeal and Error—Burden of Proof—Issues—Verdict Set Aside in Part.

The trial court has a discretion to submit issues arising from the evidence and pleadings for the jury to determine, and while it is improvident to set aside the verdict on one of the issues, when such issue is interwoven with the others, it will not be held for reversible error when the appealing party has not shown prejudice thereby.

APPEAL by defendant from MECKLENBURG Superior Court. *Lane, J.*

Action by plaintiff to recover damage on account of wrongful death of plaintiff's intestate. From a judgment in favor of the plaintiff, defendant appeals. No error.

The evidence tended to show that 22 August, 1924, the defendant's large electric delivery truck was parked on the left side of Brevard Street, Charlotte, contrary to a parking ordinance, while its driver went into the house of A. S. Campbell to deliver a package of laundry. The driver approached this position "angling across the street." The truck was painted black and red in checkerboard style. When the driver was going into the Campbell house he saw the Sams child, plaintiff's intestate, coming down the steps. These are half-moon steps, and go from the ground to the second story. "It is about six feet from the foot of these stairs to the curbstone." This Sams child came right on down and walked out of the gate to the side of the truck and got up on its left front wheel, but on the left side. The control lever is located between the steering wheel and side of the body. The child climbed up on the left front wheel, leaned over the side of the body and got hold of the steering wheel and then reached the lever and pushed it down and the car started.

When the car started the child was on the left front wheel and his feet were thrown out from under him and he caught on the side. The car went southwardly down North Brevard Street, "angling across the street." This indicated that the driver did not turn his wheels toward

the curb when he stopped the truck. The driver was still in the house. A witness jumped on the truck in an effort to stop it, and the child fell off and the truck ran over him injuring him so that he died in only twenty minutes.

There was evidence tending to show that if the truck had been parked to the right side of the curb, the child could not have reached the steering apparatus from the right, or curb side, if standing on the right-hand wheel. None of these trucks have "controller and drive" on the right side. The wheel tread is 56 inches. The defendant had owned eight electric trucks of the same kind. The left side is boxed up and the right side is not. It would be easy for a child to climb up into the truck from the right side. The switch plug on the truck is on the right side. The truck could not be moved by electric current if the switch plug is out; this big brass plug slips in and makes the connection by which the electric current is turned on. The Sams child was strong and healthy, 4 years old and accustomed to playing out on the sidewalk. If the switch plug is removed the truck is practically dead. The car was left with the brakes loose, not set. The witness who stopped the car after the injury, put on the brakes and stopped the car.

McCall, Smith & McCall for plaintiff.
J. Laurence Jones and J. A. Lockhart for defendant.

VARSER, J. There must, of necessity, be a period within which a child is incapable of exercising care to such a degree as may be otherwise legally applicable to the given situation. We are of the opinion that a child 4 years old is incapable of negligence, primary or contributory. 20 R. C. L., 124, paragraph 105; *Shellaberger v. Fisher,* 143 Fed., 937; *Purtell v. Philadelphia Coal Co.,* 256 Ill., 110; *South Bend v. Turner,* 156 Ind., 418; *Schmitz v. St. Louis R. Co.,* 119 Mo., 256; *Sou. R. Co., v. Chatman,* 124 Ga., 1026; *Chicago City R. Co. v. Wilcox,* 138 Ill., 370; *Evansville v. Senhenn,* 151 Ind., 42; *Barnes v. Shreveport City R. Co.,* 47 La. Ann., 1218; *Buechner v. New Orleans,* 112 La., 599; *Twist v. Winona R. Co.,* 39 Minn., 164; *Christian v. Fernandez,* 100 Miss., 76; *O'Flaherty v. Union R. Co.,* 45 Mo., 70; *Newman v. Phillipsburgh Horse-Car R. Co.,* 52 N. J. L., 446; *Mangam v. Brooklyn City R. Co.,* 38 N. Y., 455; *Bottoms v. R. R.,* 114 N. C., 699; *Rolin v. Tobacco Co.,* 141 N. C., 300; *Ruehl v. Rural Telephone Co.,* 23 N. D., 6; *Cleveland Rolling Mill Co. v. Corrigan,* 46 Ohio St., 283; *Kay v. Pennsylvania R. Co.,* 65 Pa. St., 269; *Summers v. Bergner Brewing Co.,* 143 Pa. St., 114; *Evers v. Philadelphia Traction Co.,* 176 Pa. St., 376; *Tucker v. Buffalo Cotton Mills,* 76 S. C., 539; *Gunn v. Ohio River R. Co.,* 42 W. Va., 676; *Hemingway v. Chicago R. Co.,* 72 Wis., 42.

This ruling is in accord with the decisions throughout this country, as indicated by the following: *McDermott v. Severe,* 202 U. S., 600. In this case the Court affirmed the judgment for plaintiff, a boy 6 years and 10 months old. The trial court instructed the jury that, since plaintiff was under 7 years of age, contributory negligence could not be attributed to him. *Tea Co. v. Freedman,* 94 C. C. A., 369; *Northern Pac. R. Co. v. Shevenack,* 122 C. C. A., 178; *Sheffield Co. v. Harris,* 183 Ala., 357; *St. Louis I. M. & S. R. Co. v. Denty,* 63 Ark., 177; *L. & N. R. R. Co. v. Arp,* 136 Ga., 489; *Anderson v. Ry. Co.,* 15 Idaho, 513; *Devine v. Chicago Ry. Co.,* 189 Ill. App., 435; *U. S. Brewing Co. v. Stoltenberg,* 211 Ill., 531; *Elwood Electric Co. v. Ross,* 26 Ind., 258; *Smith v. A. T. & S. F. R. R. Co.,* 25 Kans., 738; *Ill. Cent. R. R. Co. v. Dupree,* 138 Ky., 459; *Palermo v. Orleans Ice Mfg. Co.,* 130 La., 833; *Morgan v. Aroostook Valley R. Co.,* (Maine), 98 Atl., 628; *Marsland v. Murray,* 148 Mass., 91; *Hoover v. Detroit R. Co.,* 188 Mich., 313; *Berry v. R. R.,* 214 Mo., 593; *Dorr v. Ry.,* 76 N. H., 160; *Napurana v. Young,* 74 N. J. L., 627; *Birkett v. Knickerbocker Ice Co.,* 110 N. Y., 504; *Levine v. Ry.,* 70 Ap. Division, 426, affirmed 177 N. Y., 523; *McDonald v. O'Reilly,* 45 Oreg., 589; *Counizzarri v. Phila. & R. Ry Co.,* 248 Pa., 474; *Dodd v. Spartanburg Ry. Gas and Electric Co.,* 95 S. C., 9; *Wise & Co. v. Morgan,* 101 Tenn., 273; *Ollis v. H. E. & W. T. Ry. Co.,* 31 Tex. Civil App., 601; *Smalley v. R. R.,* 34 Utah, 423; *N. & W. R. R. Co. v. Groseclose's Adm'r.,* 88 Va., 267; *American Tobacco Co. v. Polisco,* 104 Va., 777; *Eskildsen v. City of Seattle,* 29 Wash., 583; *Parrish v. City of Huntington,* 57 W. Va., 286; *Gibson v. City of Huntington,* 38 W. Va., 177; *O'Brien v. Wis. Cent. T. Co.,* 119 Wis., 7; *Wald v. Electric Ry.,* 18 Manitoba, 134, affirmed in 41 Can. S. C., 431; *Cooke v. Midland G. W. Ry.,* 15 Ann. Cas., 557; *McGregory v. Ross,* (England) 10 Rettie, 725; L. R. A., 1917 F., 104.

A child of this tender age merely indulges the natural instincts of a child and amuses himself with an empty cart, a deserted horse, an automobile or an electric truck, or whatever may be in his sight. In so doing he is not negligent. *Lynch v. Nurdin,* 113 Eng. Rep., 1041, 1 Q. B. Rep., 29. This case has been regarded as the basic authority for this doctrine. Its facts are these: "Mr. Nurdin was an egg merchant, and used to send his servant round Soho with a cart to deliver eggs to his customers. One day, when the man was out with the cart as usual, he imprudently left it for half an hour or so standing by itself on Compton Street, drawn up by the side of the pavement. While he was away some little children began playing about the cart, climbing into it, and having all kinds of games. Amongst them was a little boy named Lynch, aged six years. He was in the act of climbing the step with a view to securing a box seat, when another mischievous little boy

pulled at the horse's bridle. The horse moved on, and the little Lynch was thrown to the ground and hurt.

"The child successfully brought an action for damages against the egg merchant, it being considered that he was not guilty of contributory negligence, as he had only obeyed a child's natural instinct in playing with the cart." Shirley's Leading Cases in the Common Law (3rd English Edition), 273.

This principle is also announced in *Magel v. Railway Co.*, 75 Mo., 653; *Koons v. R. R.*, 65 Mo., 592; *R. R. v. Fort*, 84 U. S., 553; *R. R. v. Stout*, 84 U. S., 657; Bailey on Personal Injuries, 1291; Black on Contributory Negligence, secs. 137-140; *Rolin v. Tobacco Co., supra; Berry v. R. R.*, 214 Mo., 593; *Birge v. Gardiner*, 19 Conn., 507; *Daley v. Norwich & W. R. Co.*, 26 Conn., 591; *Wilmot v. McPadden*, 76 Conn., 367, 19 L. R. A. (N. S.), 1101; *Haynes v. Gas Co.*, 114 N. C., 203; *Powers v. Harlowe*, 51 Am. Rep., 160; *Kramer v. R. R.*, 127 N. C., 330; *Barnett v. Mills*, 167 N. C., 576, and cases cited and discussed by the late *Mr. Justice Allen*. In *Wheeling and Lake Erie R. R. Co. v. Harvey*, 77 Ohio St., 235, 83 N. E. 797, 122 Am. St. Rep., 503 (including *Schwartz v. Skoon Water Works Co. idem.*, 522), the various views of this principle are cited. To the same effect is *Krachanake v. Mfg. Co.*, 175 N. C., 435; *Richardson v. Libes*, 188 N. C., 112 (a child 6 years old playing with dynamite caps. This special class of injuries to children is authoritatively reviewed in L. R. A., 1917 A., 1295N); *Graham v. Power Co.*, 189 N. C., 381. In *Ashby v. R. R.*, 172 N. C., 98, it is held that contributory negligence cannot be attributed to a child of 8 years. Authorities might be extended, but we deduce the rule to be that one is held responsible for all the consequences of his acts which are natural and probable and ought to have been foreseen by a reasonably prudent man, and if one wrongfully leaves upon a public street, in a populous city, a large electric delivery truck, with the "plug" in its place, and the brakes loose and not set, which he, as a reasonable man, ought to have foreseen, in the exercise of ordinary care, would likely be disturbed by heedless children, then he is liable for an injury resulting from such negligence. *Lane v. Atlantic Works*, 111 Mass., 136; *Union Pac. v. McDonald*, 152 U. S., 262; *Stark v. Holtzclaw*, 105 Sou., 330 (Florida).

The trial court in the charge to the jury correctly applied the rule of negligence, proximate cause, explaining an efficient intervening cause which relieves of liability. The defendants' liability has been determined by the rule of the prudent man, according to the proper test.

The court fully charged the jury that parking the truck on the left side of the street, contrary to the ordinance, was negligence; but, in order to answer the first issue "Yes" on this phase of the case, they

must find that this negligence was the proximate cause of the injury. This charge is sustained. *Kyne v. Wilmington,* 14 Atlantic, 922; *Gibson v. Leonard,* 143 Ill., 182, 17 L. R. A., 588; *Browne v. Cooper & Co.,* 191 Ill., 226; *Nickey v. Steuder,* 164 Ind., 189; *Edwards v. R. R.,* 129 N. C., 78; *Henderson v. Traction Co.,* 132 N. C., 779; *Duval v. R. R.,* 134 N. C., 331; *Cheek v. Lumber Co.,* 134 N. C., 225; *Leathers v. Tobacco Co.,* 144 N. C., 330; *Starnes v. Mfg. Co.,* 147 N. C., 556; *Rich v. Electric Co.,* 152 N. C., 689; *Ledbetter v. English,* 166 N. C., 125; *Newton v. Texas Co.,* 180 N. C., 561; *Stultz v. Thomas,* 182 N. C., 470.

However, such negligence must be the proximate cause of the injury. *McNeill v. R. R.,* 167 N. C., 390; *Dunn v. R. R.,* 174 N. C., 254; *Chancey v. R. R.,* 174 N. C., 351; *Lea v. Utilities Co.,* 175 N. C., 459; *Ridge v. High Point,* 176 N. C., 421; *Balcum v. Johnson,* 177 N. C., 213; *Construction Co. v. R. R.,* 184 N. C., 179.

The act of the Sams child in starting the truck, under the charge of the court, and in the light of the admitted facts, was not an excusing, intervening, efficient cause. The test is set out in *Balcum v. Johnson, supra; Harton v. Telephone Co.,* 141 N. C., 455.

Proximate cause, as defined in *Taylor v. Lumber Co.,* 173 N. C., 112, was applied in the instant case.

There was no error in refusing the motion to nonsuit and to give the prayers for instruction further than given in the charge.

Negligence was defined according to Baron Alderson's formula: "Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do." Pollock on Torts, 442.

We are not disposed to extend the so-called "attractive nuisance" doctrine (*Briscoe v. Lighting and Power Co.,* 148 N. C., 396, 62 S. E., 600, 19 L. R. A. (N. S.), 1116). The electric truck is in no sense a nuisance. It is a common vehicle of commerce. The street on which it was parked, without due care for the protection of the public, is open to all the people, including plaintiff's intestate, and the principle is forcibly reannounced in *Ferrell v. Cotton Mills,* 157 N. C., 528, when it says: "Although the dangerous thing may not be what is termed an attractive nuisance, that is to say, not have a special attraction for children, by reason of their childish instinct, yet, when it is so left exposed that they are likely to come into contact with it, and when their coming in contact with it is obviously dangerous to them, the persons so exposing the dangerous thing should reasonably anticipate the injury that is likely to happen to them from being so exposed, and is bound to take

reasonable care to guard it so as to prevent injury to them." *Iamurri v. Saginaw City Gas Co.*, 148 Mich., 27.

The ordinance of Charlotte, offered by defendant during the examination of plaintiff's witnesses was not competent to show diligence of plaintiff's intestate.

The defendant asserts error in setting aside so much of the first verdict as related to damages.

As this Court has said in *Jarrett v. Trunk Co.*, 144 N. C., 299, 302; *Barringer v. Barringer*, 153 N. C., 392, this practice in the trial court is not to be commended. Frequently the issues are so interwoven that serious harm may result from setting aside only one issue. The same rule obtains in the Federal courts. *R. R. Co. v. Ferebee*, 238 U. S., 274.

However, prejudice to the appellant does not affirmatively appear (*Perry v. Surety Co., ante*, 284), and the court had the power, in its discretion so to do (*Billings v. Observer*, 150 N. C., 540). No question of law or legal inference is presented by this exception and we will not interfere.

The evidence objected to was competent to explain the truck and its construction to the jury. We find

No error.

M. B. FULLER v. MOTOR AND TIRE SERVICE CO.

(Filed 9 December, 1925.)

1. Corporations—Contracts—Shareholders—Assent—Evidence.

A contract will not be inferred as a matter of law to be that of the individual shareholders by reason of the want of assent of a majority thereof, and therefore not binding upon the corporation, when there is sufficient evidence to support the opposite view.

2. Corporations—Contracts — Shares of Stock—Sales—Repurchase—Insolvency—Receivers.

Where a purchaser of stock of a corporation has agreed therewith that his stock would be purchased by the corporation in the event of his expressed dissatisfaction within two years, he may not enforce his agreement against creditors, etc., after the corporation is insolvent and is in the hands of a receiver. The validity of contracts of this character discussed by ADAMS, J.

APPEAL by defendant from *Lane, J.*, at August Term, 1925, of the Superior Court of CABARRUS County.

Plaintiff alleged that the defendant, incorporated 11 October, 1921, had been engaged before November, 1921, in doing a general motor-sales, repair, and vulcanizing business and that the plaintiff, also had

been engaged in the business of vulcanizing; that in the month of November, 1921, or about this time, the plaintiff and the defendant entered into an agreement by the terms of which the plaintiff was to sell and the defendant to purchase the plaintiff's business at the price of $2,500; that the defendant was to issue to the plaintiff 25 shares of its stock of the par value of $100 each; and "that if the plaintiff became dissatisfied with the management of the defendant company, said plaintiff could at any time within two years from the date thereof, by giving notice to the defendant of such intention, surrender said twenty-five shares of stock to the defendant and receive $2,500 cash money for his said vulcanizing business, instead of the 25 shares of stock." It was further alleged that within two years from the date of the agreement the plaintiff notified the defendant of his dissatisfaction and offered to surrender his stock in accordance with the contract and demanded in payment thereof the sum of $2,500 in cash; whereupon the defendant through its agent requested the plaintiff to wait until 1 January, 1924, and it would then absorb the stock and pay plaintiff the cash, but afterwards refused to do so.

The defendant denied these allegations, specifically alleging that no person had been authorized or empowered to make such an agreement on its behalf; and further that the alleged contract was *ultra vires,* against public policy, and void as to the creditors of the company.

The issues were answered as follows:

1. Did the plaintiff and the defendant enter into a contract whereby the plaintiff was to sell his vulcanizing business to the defendant company for 25 shares of its capital stock, as alleged in the complaint? Answer: Yes.

2. Did the defendant company agree with the plaintiff to take up said stock, and pay $2,500 therefor, upon notice from the defendant, at any time within two years from the date of the contract, as alleged in the complaint? Answer: Yes.

3. Did the defendant breach said contract, as alleged in the complaint? Answer: Yes.

4. What amount, if any, is the plaintiff entitled to recover of the defendant? Answer: $2,500.

Judgment in accordance with the verdict. The exceptions are referred to in the opinion.

Palmer & Blackwelder, Hartsell & Hartsell for plaintiff.
J. L. Crowell, Sr., and H. S. Williams for defendant.

ADAMS, J. Denying the plaintiff's right of recovery the defendant says (1) that the negotiation relied on was not a contract by the corporation but a personal promise of two of its three directors, who

owned a majority of the stock, and (2) that the contract if entered into by the defendant was contrary to public policy, *ultra vires*, and void as to creditors and stockholders not assenting thereto.

Upon the first proposition the defendant insists that the plaintiff is concluded by *Duke v. Markham*, 105 N. C., 131, in which it was held that the assent of a majority of the stockholders of a corporation expressed not in their meeting but elsewhere, will not bind the company. We find, however, by reference to the record in the present case that A. H. Jarrett, the vice-president of the defendant company, was also its general manager, and as such was invested with authority to make contracts according to the by-laws; and that by virtue of this authority he agreed with the plaintiff upon the terms of the contract set forth in the complaint. Record, p. 12. There is also some evidence of ratification. The result is, we cannot declare the contract invalid as an inference of law on the ground first assigned.

The second objection is not so easily to be disposed of. It involves the question of the defendant's liability under an agreement to repurchase shares of stock which the defendant had issued to the plaintiff. The answers to the second and third issues establish the fact that the defendant agreed to take up the plaintiff's stock and pay him $2,500 for it upon notice given at any time within two years from the date of the contract, and that after such notice the defendant refused to comply with its agreement. The contract was not in writing; it was made between 1 November, 1921, and 1 January, 1922, and the plaintiff's notice of dissatisfaction with the management of the company was given 1 October, 1923. The summons was issued 6 May, 1925, and on 13 June, 1925, the defendant made an assignment for the benefit of its creditors.

In regard to the scope and legal effect of a contract by which a private corporation agrees to sell its stock and to repurchase it upon the happening of a certain event, the decisions are not harmonious. There are at least three classes: (1) Those holding that such a contract is valid and enforceable, and not *ultra vires* or void as a secret agreement between the corporation and its subscriber; (2) those holding that it is voidable as to creditors, and especially that it will not be enforced after the corporation has become insolvent; and (3) those holding that even if the corporation be solvent and have no creditors such a contract will be avoided as against public policy, and in some cases as an unwarranted attempt to reduce the capital stock. *Porter v. Mining Co.*, 101 A. S. R. (Mont.), 569; *Schulte v. Land Co.*, 44 L. R. A. (N. S.), (Cal.), 156; *McIntyre v. Bement's Sons*, 10 Ann. Cas. (Mich.), 143; *Kom v. Detective Agency*, 50 L. R. A. (N. S.), (Wash.), 1073. See, also, *McGregor v. Fitzpatrick*, 25 L. R. A. (N. S.), (Ga.), 50, and note; *Tiger v. Cotton*

Co., 30 L. R. A. (N. S.), (Ark.), 694, and note; *Hall v. Henderson,* 61 L. R. A. (Ala.), 621.

At present we are concerned not with the abstract right of a corporation to purchase its own stock (*Blalock v. Mfg. Co.,* 110 N. C., 99), but with the plaintiff's contention that he can enforce the contract under the conditions disclosed by the record. The evidence is that the defendant was insolvent when the action was brought and had been for several months theretofore, one of the stockholders testifying that in March, 1924, the stock was worthless. The trustee in the deed of assignment was made a party to the suit, and without filing a personal answer, he adopted that of the defendant. He is to be treated as a purchaser for value (*Cowan v. Dale,* 189 N. C., 684), and as a trustee for the defendant, its stockholders and its creditors. It is his duty to protect their rights and it must be assumed that he has this object in view.

The capital stock of a corporation is a trust fund for the benefit of creditors (*Foundry Co. v. Killian,* 99 N. C., 501), and it is very generally held that a contract entered into by a corporation to purchase its own stock will not be enforced after the corporation has become insolvent. The reason is, not that a corporation cannot buy its own stock, but to enforce the contract after the rights of creditors have intervened would amount to the perpetration of a fraud. *McIntyre v. Bement's Sons, supra,* and note; 1 Cook on Corporations, sec. 170; 14 C. J., 506, sec. 751. Our own decisions are in approval of this doctrine. In *Pender v. Speight,* 159 N. C., 612, the Court said: "An insolvent corporation cannot buy in its own stock, and if it becomes insolvent after such purchase the stockholder is liable to the creditor for the purchase money received by him. *Heggie v. Building and Loan Asso.,* 107 N. C., 581. It is generally held that a corporation cannot settle with its members by the application of assets to the retirement of their stock until it has first discharged all of its liabilities, and any agreement looking to such arrangement among its shareholders is void as to creditors."

If the plaintiff were to prevail the transaction on the assumption of insolvency would amount to nothing less than a repayment of his proportionate share of the defendant's assets, and to this extent the defendant would prefer the stockholder and impair the creditors' security. *Coöp. Asso. v. Boyd,* 171 N. C., 184; *Whitlock v. Alexander,* 160 N. C., 465.

There seems to be no doubt that the corporation is insolvent and if so, the motion for nonsuit should have been allowed; but as the question has not definitely been determined the plaintiff is entitled, if he see fit, to put it in issue. Even if solvency should be established other serious questions may arise.

New trial.

W. F. MANLY v. W. F. BEAM.

(Filed 9 December, 1925.)

1. **Bills and Notes—Release of Party Thereto—Statutes—Consideration.**

The right of an obligor to defend an action against himself on a negotiable note under the provisions of C. S., 3104, that the holder may expressly renounce his right against any party to the instrument before, at or after its maturity, rests by statute, and may be done by virtue thereof only as therein expressed when the release is in writing, and may not be shown when resting only by parol. C. S., 3101, relating to the discharge of the instrument, has no application.

2. **Same—"Release"—Discharge.**

The release by the holder of a negotiable instrument of his right against any party thereto to hold him liable, is the same in legal effect as the renunciation of this right.

APPEAL by defendant from judgment of Superior Court of FORSYTH County, March Term, 1925, *Schenck, J.* No error.

Action upon note for $7,000, dated at Madison, Georgia, on 25 January, 1918, due on or before 1 January, 1919, payable to the order of plaintiff, Mrs. W. F. Manly, and executed by defendant, W. F. Beam and W. G. Thompson. The execution of the note is admitted; defendant, however, in his answer, as a defense to the action thereon, alleges "that this defendant was released by the said plaintiff from any further liability on the said note when the same was assumed by one W. G. Thompson and J. W. Carroll, the plaintiff agreeing to the assumption of the liability of this defendant on the said note by the said J. W. Carroll, the said defendant giving such consideration for his release as was demanded by plaintiff." Payments of interest accrued on said note on 25 January, 1919, and 25 January, 1920, are admitted; it is also admitted that the note was properly credited with the sum of $3,365.00 on 9 January, 1923, the said sum having been derived from the sale of land upon foreclosure of a mortgage or deed of trust securing the payment of said note.

The issue submitted to and answered by the jury was as follows: "In what sum, if any, is the defendant indebted to plaintiff upon the note described in the complaint? Answer: $5,915.30, and interest on $3,635.00 from 9 March, 1925, until paid at the rate of 8%."

From judgment upon this verdict, defendant appealed to the Supreme Court.

Swink, Clement & Hutchins for plaintiff.

Walter E. Brock and Graves & Graves for defendant.

CONNOR, J. The consideration for the note sued on in this action was money loaned by plaintiff, Mrs. W. F. Manly, to defendant, W. F. Beam

and W. G. Thompson, with which they paid the purchase price of a tract of land situate in Morgan County, Georgia. The note was secured by a mortgage or deed of trust on said land. The only payment made thereon, was from the proceeds of the sale of the land upon foreclosure of the mortgage or deed of trust, after the timber had been cut and removed therefrom by J. W. Carroll, to whom it was sold by Beam and Thompson. As part of the consideration of the conveyance to him of said timber, J. W. Carroll agreed to assume the liability of defendant, W. F. Beam, on the note held by Mrs. Manly. On 30 April, 1918, J. W. Carroll signed an endorsement written on said note by W. G. Thompson in the following words:

"For value received, I hereby agree to assume the part of liability of W. F. Beam as to within note. 4/30/1918. J. W. CARROLL."

At the time this endorsement was written on said note and signed by Carroll, the note was in the possession of W. G. Thompson, who was cashier of the Morgan County Bank. Mrs. Manly was not present. She had left the note, with other papers, with said bank for safe-keeping. It is admitted that Mrs. Manly has not released defendant in writing from liability on said note as one of the makers thereof.

As evidence of his release by plaintiff, as alleged in his answer, defendant offered the testimony of W. G. Thompson, a witness in his behalf, that after J. W. Carroll had signed the endorsement on the note, he showed the same to plaintiff, and advised her that defendant, W. F. Beam, wished to be released of liability on the note; that plaintiff said "it would be all right"; and that thereafter the note, with the endorsement signed by J. W. Carroll, was delivered to plaintiff. Plaintiff objected to this testimony. The objection was sustained, and defendant excepted. Upon his appeal to this Court, defendant relies chiefly upon his assignment of error based upon this exception.

The right of plaintiff, holder of the note, to release defendant, as one of the makers thereof, from liability, is not controverted by plaintiff; nor does she contend that such release would not be a good and valid defense to her action on the note against defendant. The objection to the testimony, offered by defendant to prove such release, is based upon the contention that evidence of a parol release of a party to a negotiable instrument is incompetent; that only a release, in writing, of such liability, would avail defendant as a defense in this action.

C. S., 3104, provides that the holder of a negotiable instrument may expressly renounce his rights against any party to the instrument before, at or after its maturity. An absolute and unconditional renunciation of his rights against the principal debtor, made at or after maturity of

the instrument discharges the instrument. The renunciation, however, must be in writing, unless the instrument is delivered up to the person primarily liable thereon.

The note sued on in this action is a negotiable instrument; plaintiff is the holder of said note; it has not been delivered up to the person primarily liable; a renunciation of her right to hold defendant liable on the note as one of the makers, in order to avail defendant, as a defense to an action against him on the note, must be in writing. A parol renunciation is not sufficient.

No substantial distinction can be made between the renunciation of a right, and the release of one from liability upon the enforcement of a right. A distinction was sought to be made in *Whitcomb v. National Exchange Bank,* 123 Md., 612, 91 Atl., 689. *Justice Urner,* in the opinion for the Court of Appeals of Maryland, says: "Undoubtedly the word 'renunciation' as used in the section quoted (identical with C. S., 3104), appropriately describes the act of surrendering a right or claim without recompense, but it can be applied with equal propriety to the relinquishment of a demand upon an agreement supported by a consideration." It was there held that by virtue of the statute, a party to a negotiable instrument can be released from liability thereon only by a writing, unless the instrument is delivered up to the person primarily liable. In *Baldwin v. Daly,* 41 Wash., 416, 83 Pac., 724, it was held that an agreement by the payee of a note to release the surety, while supported by a sufficient consideration, was ineffective because the renunciation was not in writing, as required by the Uniform Negotiable Instruments Act, in force in that state. In *Dickinson v. Vail,* (Mo.), 203 S. W., 635, plaintiff insisted that this section of the Uniform Negotiable Instruments Act only refers to and includes releases which were made without consideration. The Court says: "Plaintiff's idea seems to be that the word 'renunciation' used in the statute was not a bargain, but a renouncing in the sense of refusal to have further to do with the thing renounced. We think that not a proper construction of the statute, and that the renunciation may be made for a consideration." The release relied upon in that case admittedly was for a consideration, and being in writing, judgment for defendant was affirmed. See, also, *Pitt v. Little,* (Wash.), 108 Pac., 941; *North Pacific Mortgage Co. v. Krewson,* (Wash.), 224 Pac., 566, 3 R. C. L., 1270, 8 C. J., 615.

In Daniel on Negotiable Instruments, 6 ed., sec. 1290, it is said that the Negotiable Instruments Statute recognizes the right of a holder to renounce his rights against any party to the instrument, and defines the conditions to a renunciation. "The word 'renunciation' is used in the statute in the sense of 'release,' and a release of the maker or surety can-

not be shown by parol but must be in writing, when the note has not been surrendered."

C. S., 3101, prescribing how a negotiable instrument may be discharged, and prescribing, among other things, that it is discharged by any act which will discharge a simple contract for the payment of money, has no application to defendant's contention in this action; it is not contended that the note has been discharged; the defense is that defendant has been released by the substitution of the liability of J. W. Carroll for the liability of defendant, and that by the acceptance of this substitution, plaintiff has released defendant. Defendant concedes that the note is still in force. See *Whitcomb v. National Exchange Bank, supra,* where it is held that the construction therein of the section of the Negotiable Instruments Act which is C. S., 3104, is not inconsistent with the section which is C. S., 3101. "It is to be noted that section 138 (C. S., 3101), is confined to a designation of the *acts* which discharge the instrument and does not purport to prescribe the character of proof by which they may be established. Sec. 141 (C. S., 3104), deals specifically with the subject of discharge by renunciation and provides in effect that an extinguishment of liability to be thus accomplished must be evidenced by writing, unless the instrument is delivered up to the party primarily liable."

The construction of sec. 122 of the Uniform Negotiable Instruments Act (C. S., 3104), by the courts of jurisdictions in which the act has become the law, is well supported upon principle and by authorities. We adopt and approve this construction. A renunciation or release, whether with or without consideration, by the holder of a negotiable instrument, of rights against any party to the instrument, must be in writing, unless the instrument is delivered up to the person primarily liable. Such renunciation or release cannot be shown by parol evidence. Decisions cited in defendant's brief, apparently to the contrary, were rendered prior to the enactment in this State of the Uniform Negotiable Instruments Act, which has been in force in this State since its ratification on 8 March, 1899.

There was no error in sustaining plaintiff's objection to the testimony of the witness, W. G. Thompson, offered by defendant to prove a parol release by plaintiff of defendant from liability as a maker of the note. The execution of the note being admitted, and there being no contention that same has been paid, it seems needless to discuss the remaining assignments of error. They seem to have been made to support defendant's contention that evidence of a parol release was competent to be submitted to the jury. The law being to the contrary, we must affirm the judgment.

No error.

M. S. HYDER v. BOARD OF COUNTY ROAD TRUSTEES FOR HENDERSON COUNTY ET AL.

(Filed 9 December, 1925.)

1. Road Commissioners—Governmental Functions—Negligence.

In the absence of an allegation that road commissioners, exercising governmental functions, have taken personal charge of the work, plaintiff, a convict, was assigned to do, or that they were dealing with same purely as administrative officials, or that they acted corruptly or with malice in their official capacity, when plaintiff was injured by the negligence of one of their employees, no cause of action is stated against them, and a demurrer to the complaint filed on this ground was properly sustained.

2. Appeal and Error — Supreme Court — Per Curiam Opinions — Stare Decisis.

A per curiam opinion of the Supreme Court is a precedent upon the questions therein embraced, and ordinarily is filed where the Court is of one mind and the points of law involved are controlled by previous decisions, or otherwise they are of such a nature as not to require discussion.

APPEAL by plaintiff from *Oglesby, J.*, at June Term, 1925, of HENDERSON.

Civil action to recover damages for an alleged negligent injury due to the defendant's failure, in the exercise of ordinary care, to furnish the plaintiff a reasonably safe place to work and reasonably safe appliances with which to carry on the duties assigned to him as a convict while working on the public roads of Henderson County under the care, custody and direction of the defendants as members of and constituting the board of county road trustees for Henderson County.

There is no allegation that the defendants had taken personal charge of the work plaintiff was doing or that they were dealing with the same purely as administrative officials; nor is it alleged that they acted corruptly or with malice in their official capacity.

There is an allegation that the defendants were carrying liability insurance upon which plaintiff is entitled to recover, but the action against the defendants is not bottomed on contract, and the insurance company is not a party to the action.

Demurrers were interposed by all of the defendants and sustained upon the ground that the complaint failed to allege a valid cause of action against any of the defendants.

Plaintiff appeals.

O. V. F. Blythe and A. A. Rice for plaintiff.

Frank Carter and J. E. Shipman for defendants Bane and Wilfong.

STACY, C. J., after stating the case: The judgment sustaining the demurrers must be affirmed on authority of *Jenkins v. Griffith,* 189 N. C., 633, and *Hipp v. Ferrall,* 173 N. C., 167.

Jenkins v. Griffith was written under a *per curiam* opinion, but this in no way impairs its force as a precedent. It is supported by full citation of authorities. Ordinarily, a *per curiam* is the opinion of the Court in a case in which we are all of one mind, and where the questions presented are controlled by previous decisions, or otherwise they are of such a nature that we do not deem it necessary, or beneficial to the profession, to elaborate them by an extended discussion. *Clarke v. Assurance Co.,* 146 Pa. St., 561; *Minor v. Fike,* 77 Kan., 806, 93 Pac., 264.

Affirmed.

D. E. LAWRENCE v. THE YADKIN RIVER POWER COMPANY.

(Filed 9 December, 1925.)

1. Negligence—Evidence—Inferences.

While the facts in issue may not be established by evidence that leaves an inference for the jury of mere possibility or conjecture, it is otherwise sufficient to sustain a verdict of actionable negligence if the matters testified to, though circumstantial, will reasonably admit of the conclusion sought to be proven by the plaintiff in the action.

2. Same—Electricity—Right of Way—Transmission Line—Nonsuit.

Where an electric transmission power company maintains towers across the plaintiff's land upon which are strung wires, with evidence that they were insulated sufficiently for the passage of the voltage of electricity for its commercial purposes, that one of these insulator cups became moulten from an excessive current of electricity and fell upon the defendant's foul right of way and at the time and place fire was communicated to plaintiff's lands to his damage, it is sufficient upon which the jury may answer the issue as to the defendant's actionable negligence in the plaintiff's favor, and to deny the defendant's motion as of nonsuit.

3. Same—Act of God—Lightning—Concurring Negligence.

Where there is evidence tending to show that the damage to plaintiff's land was by fire originating on the foul right of way of the defendant electric power transmission company, by reason of an insufficient insulation of its wires, and its foul right of way and that a stroke of lightning upon its wires caused the injury: *Held,* though the defendant would not ordinarily be held liable for the damage caused solely by the act of God, it would not be excused if the injury would not have occurred except for its own negligence in not reasonably having anticipated the occurrence, and permitting its right of way to have become and remained in a foul or inflammable condition.

4. Electricity — Transmission Lines — Right of Way—Negligence—Evidence—Nonsuit—Railroads.

An electrical transmission power company is answerable in damages for a fire set out on its right of way, proximately caused by its negligence in permitting it to remain in an inflammable condition, under the decisions applying in like cases to railroad companies.

APPEAL by defendant from judgment of Superior Court of MOORE County, February Term, 1925, *Bryson, J.* No error.

Defendant owns and operates a transmission line over which electricity is transmitted, composed of a number of wires and other apparatus, extending from its plant at Blewett's Falls, in Richmond County, to Raleigh, N. C.; said wires are supported by towers and other devices for the operation of said transmission line; to prevent the escape of electricity transmitted over said line by defendant, devices known as insulators are employed. This transmission line passes over and across the lands of plaintiff in Moore County. Defendant owns a right of way over said lands, having acquired same by deed prior to the purchase of said lands by plaintiff. The transmission line was constructed and passes over said right of way.

During the afternoon of 4 July, 1923, a fire burned over plaintiff's land, destroying trees and vegetation thereon, and otherwise injuring the same. Plaintiff alleges that said fire began on defendant's right of way, on his land, immediately beneath tower No. 217, on which there was an insulator; that said insulator was weak and defective; that during the said afternoon, defendant's transmission line became excessively charged with electricity, causing the said insulator to become very hot; that because of the heat, and of its defects, the insulator, made of iron, porcelain and cement, burst; that its broken parts, very hot and in a moulten condition, dropped to the ground, and ignited the dry grass and decaying vegetation which had accumulated on the right of way, beneath said tower; that the fire which burned over and injured plaintiff's land spread from this burning grass and vegetation. These allegations are denied by defendant.

The issues submitted to the jury were answered as follows:

1. Were the lands of plaintiff burned and injured by the negligence of defendant, as alleged in the complaint? Answer: Yes.

2. If so, in what sum, if anything, is the defendant indebted to plaintiff on said account? Answer: $800.

From judgment on this verdict, defendant appealed to the Supreme Court.

H. F. Seawell for plaintiff.
U. L. Spence for defendant.

CONNOR, J. The first assignment of error, discussed in the brief for defendant, is the refusal of the court to allow the motion for judgment as of nonsuit, made at the close of the evidence offered by plaintiff, and renewed at the close of all the evidence; C. S., 567. This assignment of error presents to this Court the contentions upon which defendant chiefly relies upon its appeal from the judgment of the Superior Court. Defendant contends that there was no evidence sufficient to show that the origin of the fire was as alleged in the complaint; that if the fire began as alleged, there is no evidence that the bursting of the insulator was caused by the negligence of defendant, as alleged; that if the fire originated from burning grass and vegetation ignited by broken parts of the insulator, which had dropped from the tower, in a moulten condition, and if the insulator burst as the result of heat caused by excessive electricity on the wire, this was the result of a stroke of lightning—an act of God—and was not due to negligence of defendant, as alleged.

Defendant further contends that if its right of way was in the condition which the evidence tends to show, this was not, in itself, negligence, for that the law applicable to a railroad company, operating steam engines over the tracks on its right of way, is not applicable to defendant, which maintains over its right of way lines for the transmission of electricity for the purpose of furnishing light and power to its patrons.

Unless there is evidence from which the jury could find, or fairly and reasonably infer and conclude that the grass and vegetation on defendant's right of way, beneath the transmission line, was ignited by broken parts of the insulator on the tower above, which had dropped therefrom, very hot and in a moulten condition, and that the fire which burned over plaintiff's lands spread from such burning grass and vegetation, defendant's motion for nonsuit must be allowed, for unless plaintiff's allegation as to the origin of the fire is sustained he cannot recover. The evidence submitted to the jury must be of sufficient probative force, if believed, to establish the primary fact involved in the issue. If the evidence would leave the jury to conjecture and speculate as to the origin of the fire, then it is not sufficient to be submitted to the jury. *Dickerson v. R. R., ante,* 292, 129 S. E., 810; *Whittington v. Iron Co.,* 179 N. C., 647, 103 S. E., 395; *S. v. Bridgers,* 172 N. C., 879, 89 S. E., 804; *Liquor Co. v. Johnson,* 161 N. C., 75, 76 S. E., 625; *Lewis v. Steamship Co.,* 132 N. C., 904, 44 S. E., 666. The rule has been approved by this Court that evidence which merely shows it possible for the fact in issue to be as alleged, or which raises a mere conjecture that it is so, is an insufficient foundation for a verdict, and should not be submitted to a jury.

On the other hand, if there is evidence from which the jury could find, or fairly and reasonably infer and conclude that the grass and vegeta-

tion were ignited by the broken parts of the insulator on defendant's tower, which had dropped thereon as a moulten mass, and that the fire which burned plaintiff's lands originated from the burning grass and vegetation, thus ignited, then the evidence is sufficient to be submitted to the jury, to be considered by them, under proper instructions of the court, upon plaintiff's allegation as to the origin of the fire. The fact if found by the jury, that the fire was originated by the moulten mass, composed of broken parts of the insulation on defendant's transmission line, would in itself be evidence of negligence. *Cotton Oil Co. v. R. R.,* 183 N. C., 95, 110 S. E., 600; *Perry v. Mfg. Co.,* 176 N. C., 69, 97 S. E., 162; *White v. Hines,* 182 N. C., 288, 109 S. E., 31; *Speas v. Bank,* 188 N. C., 524, 125 S. E., 398; *Hunt v. Eure,* 189 N. C., 482, 127 S. E., 593.

There was evidence tending to show that the fire, burning on plaintiff's land, on 4 July, 1923, was first discovered about 3 o'clock in the afternoon; that at that time about half an acre of land, to the north of tower No. 217 had been burned over; the fire was then burning all the way down to within six feet of the tower on the southeast side; the wind was coming from the southeast and the fire going to the northwest. It was dry weather; the wind was stirring, but it was not very windy; the land around the tower was burned.

An insulator on the tower was broken, but it was still supporting the wire which was attached to it; there was nothing the matter with the tower line, except that the cups on two of the insulators were knocked off. Wire grass and stumps, lightwood knots and dead wood were burning. On the ground, beneath the tower, a moulten mass was found about two hours after the fire was first discovered. It was then cold. This mass was exhibited to the jury. There were some fine pieces and some large pieces on the ground. They were fragments of a broken insulator; the fire was burning within three feet of the moulten mass, and these fragments.

On Friday, 29 June, 1923, a patrolman, employed by defendant, inspected tower No. 217; he found all the insulators on said tower in perfect condition; none were broken; on Friday, 5 July, 1923, the patrolman again inspected said tower, when he found that two of the insulators—No. 1, at the bottom, and No. 2, next above it—were broken: nearly all the porcelain on insulator No. 1 was knocked off, and there was a little check on insulator No. 2, indicating that a small portion of the porcelain had been broken from it. The wires were still in position. Each wire is supported by seven insulators. There were seven wires to the tower, six service wires and one brace wire. On Sunday following, the patrolman fixed the broken insulators. An insulator is made of porcelain which is a nonconductor of electricity. This porcelain is held

in an iron cup, by cement. The purpose of the insulator is to prevent the escape of electricity transmitted on the wire, at the towers. Each insulator is supposed to insulate from thirty to thirty-five thousand volts. Seven insulators are used on each tower for safety. The minimum insulation between the live wire at the bottom and the tower is 210,000 volts—30,000 to each of the seven insulators. The maximum voltage on the wires of defendant on 4 July, 1923, was around 94,000 volts. A stroke of lightning carries a voltage from a million up. There are indicators both at Blewett's Falls and at Raleigh which show when lightning has struck any of the insulators along the transmission line between those two points. According to these indicators, the tower line was disturbed by a stroke of lightning about 2 p. m. on 4 July, 1923. The fire on plaintiff's land, near tower No. 217, was discovered about 3 p. m., according to the testimony of the witness who first saw it.

This evidence is sufficient, if believed by the jury, to establish the following facts:

1. That the fire which burned over plaintiff's lands originated on defendant's right of way across said lands, at a point beneath tower No. 217.

2. That prior to the said fire, an insulator on said tower No. 217, was broken, and that the broken parts and fragments of said insulator dropped to the ground beneath the tower.

3. That the fire began at or near the place on defendant's right of way beneath said tower, where said broken parts and fragments were found, while the fire was burning.

4. That the insulator, which was broken on 4 July, 1923, was not broken, but was in perfect condition, on 29 June, 1923, when tower No. 217 was inspected by defendant's patrolman.

5. That said insulator was broken because it was subjected to heat of sufficient intensity to melt the iron, cement and porcelain of which it was composed; that when the broken parts dropped to the ground they were a moulten mass, and that there was dry grass and decaying vegetable matter on the ground when said moulten mass dropped from the tower to the ground.

6. That the electricity put on the wires composing the transmission line between Blewett's Falls and Raleigh, by defendant during 4 July, 1923, was not of sufficient intensity to cause the insulator to break, resulting in the dropping of broken parts in a moulten mass and of fragments of said insulator to the ground.

7. That about 2 o'clock on the afternoon of 4 July, 1923, lightning struck the wires on defendant's transmission line between Blewett's Falls and Raleigh; that the voltage from a stroke of lightning greatly exceeds the voltage of electricity used by defendant over its wires in the conduct

of its business of transmitting electricity to be used for lights and power by its patrons.

Only one other fact is necessary to be established in order to sustain plaintiff's allegation as to the origin of the fire, to wit, that the moulten mass, composed of broken parts of the insulator, when it fell upon the ground, ignited the dry grass and decaying vegetable matter which was on the right of way beneath the tower. We are of the opinion that under the rule approved by this Court, this fact may be fairly and reasonably inferred by the jury from the facts and circumstances shown by the evidence. In finding said fact, the jury would not be left to mere speculation and conjecture. There was no error in refusing the motion for judgment of nonsuit upon defendant's contention that the evidence was not sufficient to sustain plaintiff's allegation as to the origin of the fire.

It is held by this Court, in *Moore v. R. R.*, 173 N. C., 311, that where the fact in controversy is as to the origin of a fire, such fact may be established by circumstantial evidence, and that where the circumstances proven have sufficient probative force to justify a jury in finding that the fire originated from a spark set out by defendant's engine, the evidence should be submitted to the jury. The evidence in this case meets the test approved by Prof. Wigmore, vol. 5, 2 ed., sec. 2494, as follows: "Are there facts in evidence which, if unanswered, would justify men of ordinary reason and fairness in affirming the question which the plaintiff is bound to maintain?" While the origin of the fire, which it is alleged caused damage to plaintiff, must be fixed by the evidence upon defendant, in order that it may be held liable for the damages, this may be done by evidence sufficient to support a fair and reasonable inference from facts established by the evidence that the fire was set out by defendant, or by some agency under its control and for which it was responsible.

"In actions against railroad companies for injuries to property by communicated fires, while it is necessary to trace the liability for the fire to the defendant, and proof of a mere possibility that the fire communicated arose in the operation of the road is not sufficient, yet it is not required that the evidence should exclude all possibility of another origin, or that it be undisputed. It is sufficient if all the facts and circumstances in evidence fairly warrant the conclusion that the fire did not originate from some other cause, and the origin of the fire has generally been held sufficiently established by inferences drawn from circumstantial evidence." 11 R. C. L., p. 994, sec. 46. We see no reason why this statement of the law, supported by abundant citations, should not be applicable to actions against light and power companies transmitting and dealing in electricity, for damages to property caused by fire, alleged to have been caused by negligence. *Peterson v. Power Co.*, 183 N. C., 243.

It may be conceded that there is no direct evidence of positive negligence on the part of defendant, with respect to the condition of the insulator, alleged to have been weak and defective, or with respect to an excessive voltage of electricity put on its transmission line by defendant during the afternoon of 4 July, 1923, sufficient to cause the insulator to burst, on account of heat generated by the electricity. It may further be conceded that a stroke of lightning caused excessive voltage of electricity on said lines resulting in the bursting of the insulator, and the dropping of the broken parts, in a moulten mass, upon the ground below the tower. This was an act of God; the defendant cannot be held liable for damages caused solely by a stroke of lightning. *Harris v. R. R.*, 173 N. C., 110; *Tuthill v. R. R.*, 174 N. C., 77.

The court instructed the jury as follows: "Where injuries result from an act of God, no one is responsible, whether there is any connection between an act of an individual or a corporation, and the act of God, but where there is a concurring responsibility between the act of an individual and an act of God, and where the concurring responsibility of the individual continues up to and is an efficient cause in producing damage, then it is said to be actionable negligence; the Supreme Court in *Comrs. v. Jennings,* 181 N. C., 393 has said, approving the statement of the law of Shearman & Redfield on Negligence, vol. 1 (Street's ed.), p. 76, sec. 39, 'It is universally agreed that if the damage is caused by the concurring force of the defendant's negligence and some other cause for which he is not responsible, including the act of God, or superior human force directly intervening, the defendant is nevertheless responsible, if his negligence is one of the proximate causes of the damage. It is also agreed that if the negligence of the defendant concurs with the other cause of injury, in point of time and place, or otherwise so directly contributes to the plaintiff's damage that it is reasonably certain that the other cause alone would not have sufficed to produce it, the defendant is liable, notwithstanding he may not have anticipated or been bound to anticipate the interference of the superior force, which, concurring with his own negligence, produced the damage.' "

Defendant, conceding this to be a correct statement of the law, excepted to the instruction and assigns same as error. Defendant thus presents its contention that if the condition of its right of way on 4 July, 1923, was as the evidence tends to show, this condition was not negligence, which concurring with the bursting of the insulator, caused by a stroke of lightning, caused plaintiff damage. Defendant earnestly insists that the rule, well settled by the decisions of this Court, that it is negligence for a railroad company operating over its right of way locomotive engines propelled by steam, to permit such right of way to become foul with inflammable matter, should not be applied to a power company which

has constructed and maintains over its right of way lines for the transmission of electricity. In his charge to the jury, his Honor, in effect, instructed them that notwithstanding they should find that the insulator was broken by a stroke of lightning, for which defendant could not be held responsible, if they found that the right of way, beneath the tower, was covered with dry grass and decaying vegetation, which was inflammable, this would be negligence, and if one of the concurring causes of the injury sustained by plaintiff, it would be actionable negligence.

There was evidence tending to show that before the fire defendant's employees had chopped down bushes on the right of way, which had been left there; that they were dry. Wire grass on the right of way, near the tower, had not been burned off for a number of years. Nothing had been done to clean off the right of way since the preceding summer when the bushes were cut down and left on the right of way.

In *Moore v. R. R.*, 124 N. C., 339, it was admitted by the plaintiff that the engine was in good condition, and had a proper spark-arrester and was skillfully operated. With this admission, the question of negligence in having defective machinery was eliminated. It was held in the opinion written by *Chief Justice Faircloth* that "if sparks should escape from such an engine as the above, properly handled, and should set on fire combustible matter along the right of way, the defendant would be liable for injuries resulting therefrom, not because the sparks escaped, but for allowing inflammable matter to remain on the premises; but if sparks from such an engine go beyond the defendant's right of way and ignite such matter, over which the defendant has no control, it would not be guilty of negligence in that respect, nor for the escape of the sparks." This statement has been cited and approved so frequently that it is conceded to be the law relative to railroad and lumber companies, operating steam engines on their right of ways. In the instant case, if the jury should find that the fire was set out by the broken parts of the insulator, but that there was no negligence in that respect because the insulator was in good condition and was broken by a stroke of lightning, there still remains the question as to whether defendant was negligent with respect to the right of way, and if so, whether such negligence was an efficient, proximate cause of plaintiff's injury.

In Pollock on Torts, 12 ed., page 442, the general rule, as stated by *Baron Alderson,* is approved: "Negligence is the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do." When defendant constructed its transmission line from Blewett's Falls to Raleigh, over its right of way, acquired by deed or as the result of condemnation proceedings, it found it necessary, in order to install its wires, to place

towers along its right of way; for the purpose of preventing the escape of electricity at these towers, and also for purposes of safety, it installed at each tower insulators, the maximum capacity of each insulator being 30,000 volts; if the electricity on the wires at any one time exceeds the maximum, it is probable that the insulators will become so heated that they will burst, and that the broken parts will fall to the ground beneath the tower. A stroke of lightning carries a voltage from a million upwards. There is always during the summer time, a probability of lightning striking the wires on the transmission line. A reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, and regardful of the rights of others, would foresee the probability of fire originating on the right of way, from the dropping of heated masses of metal or porcelain upon inflammable matter beneath the tower. No reason presents itself to us why we should not approve his Honor's instruction to the jury that it was negligence for the defendant to permit dry grass and decaying vegetable matter to remain on its right of way, under and about its tower No. 217, under circumstances which they might find from the evidence submitted to them.

If the right of way beneath the tower had been free of inflammable matter, the moulten mass and fragments of the shattered insulator would have quickly cooled, and no harm would have resulted to plaintiff.

The assignment of error is not sustained. The judgment is affirmed. There is

No error.

MUDDY CREEK DRAINAGE COMMISSION, COMPOSED OF A. S. ABERNATHY, J. A. GETTYS, T. Y. BIGGERSTAFF, G. B. MANGUM, L. L. LAIL AND WILLIAM HEMPHILL, v. T. L. EPLEY.

(Filed 9 December, 1925.)

Drainage Districts—Assessments—Liens—Actions—Parties—Statutes.

The assessment of owners of land in a drainage district given by chapter 348, Public-Local Laws of 1913, amended by chapter 107, Public-Local Laws of 1925, is a lien *in rem*, and enforcible in equity, in analogy to the enforcement of a tax lien, by an action by the commissioners of the district: and the position that the sole method is by the sheriff, etc., under proceedings under the provisions of the act itself, is untenable. C. S., 7990.

APPEAL by plaintiff from MCDOWELL Superior Court. *Harding, J.*

The plaintiffs allege that they were the duly constituted board of Muddy Creek Drainage Commission, pursuant to chapter 348, Public-Local Laws of 1913; and that the defendant resides in McDowell County

and is the owner of certain lands in Muddy Creek Valley, in said county, which lands are a portion of Muddy Creek Drainage area; that, pursuant to said act, plaintiffs, for the purpose of drainage of Muddy Creek, assessed against the defendant's land in Muddy Creek, for the years of 1915, 1916, 1917, 1918 and 1919, the sum of $395.00, which levy was placed in the hands of the sheriff of McDowell County, who died without collecting the same, and that they are empowered and authorized to collect the same pursuant to chapter 107 of the Public-Local Laws 1923.

The defendant demurred, assigning grounds of demurrer as follows:

"1. That it appears from the face of the complaint that the only authority for the institution and maintenance of this action is by authority of chapter 107, Public-Local Laws 1923, and that it appears from the provisions of said act that any assessment dues under said drainage act can only be collected by and through a collector, to be appointed by the plaintiff as provided in said chapter 107, Public-Local Laws 1923, and that plaintiff has no authority in law to maintain this action in its corporate name.

"2. That it does not appear from the face of said complaint that under the provisions of said chapter 107, Public-Local Laws 1923, that plaintiff has proceeded to the collection of such assessments alleged to be due as provided therein or that it has exhausted the remedy therein provided for such collection."

The judgment sustaining the demurrer was entered and the plaintiff appealed.

Avery & Hairfield and Hudgins, Watson & Washburn for plaintiff.
Spainhour & Mull and Morgan & Ragland for defendant.

VARSER, J. Plaintiff's right to collect, by suit, the assessments made against the land in Muddy Creek Drainage District, for the purpose of settling its outstanding indebtedness, is challenged by the demurrer. Plaintiff's powers and duties are prescribed in chapter 348, Public-Local Laws 1913, as amended by chapter 107, Public-Local Laws 1923. Its additional powers are those that arise by necessary implication. The assessment is expressly made a lien on the lands within the drainage district, according to the assessment roll. This assessment is *in rem*, and not *in personam*, and the land in the district is the sole security for the payment thereof. *Drainage District v. Huffstetler*, 173 N. C., 523.

We are of the opinion that the drainage district has the power to maintain this action for the purpose of foreclosing the lien of said assessment in analogy to the foreclosure of a tax lien under C. S., 7990, formerly Rev., 2866. *Drainage District v. Huffstetler, supra; Wilmington v. Moore*, 170 N. C., 52; *Guilford v. Georgia Co.*, 112 N. C., 34.

Gatling v. Comrs., 92 N. C., 536 is not in conflict with its ruling. The sole question presented in this latter case was whether the plaintiff, a judgment creditor of Carteret County on bonds issued by the county, can set up the judgments as a set-off or counterclaim against the taxes admitted by him to be due to the county, and the court held that he could not, citing Cooley on Taxation, 15, 16, to the effect that, "when no remedy is specially provided, a remedy by suit may fairly be implied, but when one is given which does not embrace an action at law, a tax cannot in general be recovered in a common-law action as a debt."

The case at bar is not an action at law to recover in debt, but is a suit in equity to foreclose a lien. The summary method of collection by a sheriff or collector is not an exclusive remedy. *Wilmington v. Moore, supra.* A sheriff of either of the counties in which the area embraced within this drainage district lies, could not maintain an action *in his name* to collect this tax. *Berry v. Davis,* 158 N. C., 170. *Non constat* that the drainage district in the same manner as a city or county may not maintain such action.

We cannot conceive that the Legislature intended, when it granted this power to tax, which is the highest and most essential power of the government, an attribute of sovereignty and absolutely necessary for the existence of the drainage district, to make the collectibility of the assessments solely dependent upon a sheriff or tax collector, however great his diligence might be. *New Hanover County v. Whiteman, ante,* 332.

The judgment sustaining the demurrer is

Reversed.

STATE v. WILFONG TROTT.

(Filed 9 December, 1925.)

1. Evidence—Motion to Dismiss—Nonsuit.

Defendant's motion to dismiss in a criminal action for insufficient evidence to convict, will be denied if there is any phase thereof which tends to prove his guilt.

2. Homicide—Murder—Drunkenness—Criminal Law.

Voluntary drunkenness which produces irresponsibility will not ordinarily excuse liability for a criminal offense committed under the influence of intoxication thus produced.

3. Same—Automobiles—Collisions—Negligence.

Where one in charge and control of an automobile becomes drunk, and before losing his senses puts another in charge of the car to operate it, and remains in the automobile on the back seat and becomes mentally

incapacitated, and the one operating the car had likewise been drinking with the defendant, and by his reckless driving in violation of our statute, runs into another automobile and causes the death of a person for whose death the defendant is on trial for murder in the second degree or manslaughter, a prayer that there is no evidence of murder in the second degree will be denied.

4. Same—Malice.

The malice necessary for a conviction of murder in the second degree, may be inferred or implied from a reckless or wanton act which imports danger to another, evidencing mental depravity and disregard of human life.

5. Same—Intent.

The intent to kill may be presumed from the facts and circumstances attending the taking of a human life, with which the defendant is charged.

APPEAL by defendant from *Stack, J.*, at a Special Term of the Superior Court of CATAWBA County, held in April, 1925.

The defendant and one Robert Michael were jointly indicted for the murder of Evelyn Rowe. When the case was called for trial the solicitor announced that the State would prosecute the defendants only for murder in the second degree or for manslaughter. Both were convicted of murder in the second degree. Michael did not appeal; but from the judgment pronounced against himself the defendant appealed to this Court.

The facts may be reduced to a summary statement. On 9 February, 1925, about noon, Lewis Yoder, Fred Yount, Robert Michael, and the defendant left Newton in a seven passenger Hudson car bound for a clubhouse at Lookout Dam on Catawba River. About 1 o'clock they bought a pint of liquor and drank a part of it. Arriving at the club house about 2 or 2:30 they bought and ate eggs, tomatoes, sausage, and pork and beans; and at four o'clock they started back by another road in the direction of Newton. At 4:30 they bought a quart of liquor, one of the witnesses being uncertain "whether they drank it up or not." Two miles from Conover the car slid into a bottom and stuck in the mud, and an hour afterwards a team of horses pulled it out. The party then went to Conover and stopped at a filling station; it was then dark, about seven o'clock. At 7:30 or 7:45 they reached the cotton-mill office in North Newton, and Fred Yount walked home; but having bought another quart of liquor the defendant there took several more drinks and Michael and Yoder each at least one. Up to this time the defendant had driven the car. He said he did not know when he left the cotton mill or who had charge of the car when it was driven away, and Yoder said the defendant was too drunk to drive and he would not ride with him. But Michael testified: "After we came out (of the office) Mr.

Yoder was sitting in the front seat and I got in the back and he said, Wilfong Trott asked me to drive. Mr. Trott told me to drive, said he was tired, had been driving all day. Yes, I brought Mr. Yoder home. That was the first time I had done any driving that day. Mr. Yoder sat in the front seat with me as I came down town. Mr. Trott got in the back seat and we went to the hot-dog stand. I took Mr. Yoder home before I went to the Wiener stand. When I went to Mr. Warlick's garage I got out. Before I took Mr. Yoder home we went back up the street to look for Mr. Yoder's car, but we didn't find his car and I took him on home. Then the only two persons remaining in the car were me and Mr. Trott, and that was the situation when we went to Mr. Warlick's garage. I stayed at the garage I suppose ten or fifteen minutes. While I was there I saw Mr. Jones, the policeman. Something was said about a policeman being around there. Mr. Robert Huffman and Wade Gilbert said when Mr. Jones passed, 'There went K. C. Jones,' and he drove out and turned around and started back and Mr. Huffman and Mr. Gilbert said, 'You had better get away from here.' That was said in Mr. Trott's presence, and Mr. Trott said: 'Get on the wheel and get away.' I think Mr. Trott was sitting on the back seat. When that was said, I got in the car and went ahead." There was evidence of remarks made by the defendant twice after the car left the garage and before the collision.

W. A. Misenheimer owned the Hudson car, but the defendant had charge of it. He testified: "I did leave my car in Mr. Trott's hands,—left Mr. Trott in charge of my business when I went away. I left a seven-passenger Hudson car in his charge—Mr. Trott had managed my business and had this car four or five months before this tragedy."

While the defendant and Michael were at Warlick's garage, or about that time, Paul Yount and Joe Cline went in a Ford roadster up the street towards the depot and overtook nine girls who, having attended a meeting of the "Children of the Confederacy," were on their way home. The boys took six of the girls into the car, Evelyn Rowe (fifteen years of age) and Mildred Phillips standing on the left running board. Just before the girls got into the car the Hudson passed, without any lights, going in the same direction. The Ford then turned, and after going down the street and around the square, went back up Main Street. Near Ross Hewitt's residence the Hudson was seen coming back. The Ford with lamps lighted was then on the right side of the street, going towards the depot at the rate of ten or fifteen miles an hour, the two right wheels off the hard surface; and the Hudson came from the direction of the depot on the same side of the street, lights on, at the rate of fifty or sixty miles an hour, according to the State's evidence, and thirty or thirty-five according to the defendant's. It

struck the Ford carrying it twenty-five or thirty feet down the street, hurled Mildred Phillips twenty feet, injuring her severely, and Evelyn Rowe sixty feet to the south, causing her immediate death, and then ran on about a hundred yards, turned over, and threw Michael and the defendant into the street. Michael was driving the car at the request of the defendant.

The assignments of error appear in the opinion.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

Wilson Warlick and Self & Bagby for defendant.

ADAMS, J. The defendant's motion to dismiss the action and his first prayer for instructions assail the evidence on the ground of its insufficiency to warrant a verdict of murder in the second degree or of manslaughter. It is earnestly argued that the fumes of drink had stupefied the defendant's brain to such a degree that when he left the cotton mill he was asleep; that he was incapable of forming an intelligent estimate of the speed with which the car was moving or of doing anything to prevent the collision; that in fact he knew nothing of Michael's alleged recklessness and should not be charged with the consequences of Michael's acts.

Several of our decisions are in support of the general rule (to which there may be exceptions, as suggested in the concurring opinion in *Williams v. R. R.*, 187 N. C., 355), that the negligence or wantonness of one who drives a car will not ordinarily be imputed to another occupant who neither owns the machine nor has any kind of control over the driver. *Duval v. R. R.*, 134 N. C., 331; *Baker v. R. R.*, 144, N. C., 36; *Hunt v. R. R.*, 170 N. C., 443; *Williams v. R. R., supra; Albritton v. Hill, ante*, 429. But the defendant is confronted with the question whether in view of the whole evidence the principle enunciated in these cases is available in his defense. His motion to dismiss the action essentially implies his denial of all guilt; and if there is any phase of the evidence which tends to establish his criminal responsibility for the death of the girl the motion must of course be denied.

That the defendant was intoxicated may be conceded; but his intoxication was voluntary, and voluntary drunkenness usually furnishes no ground of exemption from criminal responsibility. In Clark's Criminal Law it is said: "When a person voluntarily drinks and becomes intoxicated and while in such condition commits an act which would be a crime if he were sober, he is nevertheless responsible, the settled rule being that voluntary drunkenness is no excuse. A person may be so drunk when he commits an act that he is incapable, at the time, of

knowing what he is doing; but in case of voluntary intoxication a man is not the less responsible for the reasonable exercise of his understanding, memory, and will." C. 5, sec. 27. And in *S. v. John*, 30 N. C., 330: "All the writers on the criminal law from the most ancient to the most recent, so far as we are aware, declare that voluntary drunkenness will not excuse a crime committed by a man, otherwise sane, whilst acting under its influence." See, also, *S. v. Keath*, 83 N. C., 626; *S. v. Potts*, 100 N. C., 457; *S. v. Wilson*, 104 N. C., 868; *S. v. McDaniel*, 115 N. C., 807; *S. v. Murphy*, 157 N. C., 614; *S. v. Shelton*, 164 N. C., 513; *S. v. Foster*, 172 N. C., 960.

The defendant does not attack this doctrine, but admits it; he does not attempt to evade the fact or the legal significance of the fact that he was in the Hudson car; but he contends that he was utterly incapacitated and had nothing to do with its operation. There is evidence to this effect; but there is other evidence which tends to show that while under the influence of liquor, and "otherwise sane," he directed Michael, who also was intoxicated, to take charge of the car—"to get on the wheel and get away"; and that Michael obediently "got under the wheel," and soon thereafter, in breach of three separate statutes (C. S., 2614, 2617, 2618), and with reckless disregard of the public safety ran the car on one of the main streets, after dark, at the rate of fifty or sixty miles an hour, wrecking the roadster, killing the deceased, and imperiling the lives of six or eight others. That the defendant was not irresponsible (*S. v. Shelton, supra*), but guilty of a breach of the criminal law, and that the evidence was sufficient to justify such a finding, hardly admit of serious doubt. The motion to dismiss the action and the request to give the first prayer for instructions, were therefore properly denied.

It is next contended that Michael was not guilty of any higher degree of homicide than involuntary manslaughter; that in the commission of this offense there are no aiders or abetters; that the defendant cannot be charged with manslaughter or indeed with any offense unless it is shown that he had control of his mental faculties and operated or directed the operation of the car at the time it was driven from Warlick's garage or between the time of its departure and the moment of the collision; and that he did not direct and was not then capable of directing the removal or the operation of the car. This position he urged on the trial, not only by his second and third prayers for instructions, but by exceptions to certain parts of the charge, the substance of which is embraced in the following paragraph: "If Trott ceased to drive his car at Yount's mill and then and there fell asleep or became so drunk that he was incapable of knowing what took place thereafter up to the moment of the collision, then he would not be guilty of any offense, unless he turned the operation of the car over to Michael before he became in-

capable of knowing what he was doing. But, if Trott turned the operation of the car over to Michael, knowing that Michael was intoxicated, and after doing so, Trott fell asleep or became so dead drunk that he was incapable of knowing what he was doing, still he would be liable for his act which took place when he did know what he was doing and before becoming unconscious."

The defendant was not convicted of manslaughter, but of murder in the second degree. For this reason minute attention to the law of manslaughter is not necessary; if the conviction is upheld the case will be ended, and if it is not, a new trial will be awarded. We must therefore determine whether the verdict and judgment shall be sustained or whether the evidence shall be submitted to another jury.

Murder in the second degree, or murder at common law, is the unlawful killing of a human being with malice aforethought. Malice does not necessarily mean an actual intent to take human life; it may be inferential or implied, instead of positive, as when an act which imports danger to another is done so recklessly or wantonly as to manifest depravity of mind and disregard of human life. This principle was clearly stated in the charge; but in reference to its application the defendant's chief contention is this: there is not only an absence of actual malice, but no such evidence of recklessness, wantonness, or depravity as is necessary to supply the intent or to raise an inference of malice.

It is true that the use of a deadly weapon, as a gun, pistol, or dagger, is prima facie evidence of malice, and the fact of its intentional use imposes upon the accused the burden of showing circumstances in mitigation or excuse. *S. v. Fuller,* 114 N. C., 885; *S. v. Norwood,* 115 N. C., 789; *S. v. Brinkley,* 183 N. C., 720. But the principle applicable to the case at bar does not involve the exercise of a specific intent as in *S. v. Allen,* 186 N. C., 302, and *S. v. Williams,* 189 N. C., 616, but the existence of one which is general and implied; and voluntary drunkenness does not affect the presumption of a general criminal intent arising from homicide if the other attendant circumstances afford neither justification, excuse, nor mitigation. See cases cited above; 29 C. J., 1056, sec. 20. Furthermore, it has been held that where the act causing death is not only *malum in se* but also *malum prohibitum* the homicide is sufficient to warrant a finding of the implied malice which would make the causal act murder at common law. *Maxton v. State,* 187 N. W. (Wis.), 253; *Montgomery v. State,* 190 N. W., 105.

"A person driving a carriage happens to kill another: If he saw or had timely notice of the mischief likely to ensue, and yet wilfully drove on, it will be murder; for the presumption of malice arises from the doing of a dangerous act intentionally. There is the heart regardless of social duty." 1 East's Pleas of the Crown, 263.

Approving this doctrine *Huddy* says: "The act of a motorist may fall within the cases of murder in such a manner as to evince a depraved mind, as where one voluntarily becomes intoxicated while driving a car, and then drives on the streets of a city at a high rate of speed, heedless of pedestrians or of his acts. To make a case of murder against a motorist exceeding the speed limit, it should appear that such conduct was directly perilous to human life or that human life would probably be endangered thereby. Thus, if one in charge of a car so operated it where he saw people on the street and in danger, and if he so operated his car where he knew it to be probable that people were in the way, malice may be implied." Automobiles, 7 ed., 993, sec. 917. See, also, The Law of Automobiles by Berry, sec. 1758.

It would be idle to say that Michael's reckless driving was unintentional or that he did not know the speed of the car was excessive when the collision occurred. Indeed, it is not unreasonable to infer that he was conscious of a "malignant recklessness of the lives and safety of others" when for the last time he drove the car down the street. It is hardly less evident that the defendant a short time before commanded a speedy removal of the car to avoid arrest, and that although intoxicated he was not irresponsible. Over the car he had absolute control; he had procured or assisted in procuring the whiskey; and he was responsible at least in part for Michael's condition. After making Michael his chauffeur and ordering him "to get away" from the garage he cannot now disclaim responsibility for the operation of the car under circumstances from which may be implied the malice that distinguishes murder in the second degree from the lesser crime of manslaughter. *S. v. Lilliston,* 141 N. C., 857.

We have given attention to the exceptions relating to the admission and exclusion of evidence and find no reason for reversing the ruling of the court. The material questions are presented in the assignments of error which we have undertaken to review. We find

No error.

INDEPENDENCE TRUST COMPANY AND UNION NATIONAL BANK v. PORTER & BOYD, INC., MASSACHUSETTS BONDING & INSURANCE COMPANY AND THE NORTH CAROLINA STATE HIGHWAY COMMISSION.

(Filed 9 December, 1925.)

1. Government—Highways—State Highway Commission.

The State Highway Commission is a governmental agency of the State, while acting within the powers and duties prescribed in the act creating it.

2. Same—Venue—Statutes.

An action against the State Highway Commission and a surety on the contractor's bond given for payment of laborers, etc., upon a State highway construction, prior to 10 March, 1925, is properly brought in the county within this State in which the plaintiff resides, and may not be removed as a matter of right therefrom to the court of the county in which the work was done. C. S., 2445, not applying in such cases.

3. Same—Prospective Statutes.

An action against the State Highway Commission and surety on contractor's bond given for the benefit of those performing labor or work upon a State highway since 10 March, 1925, is governed as to venue by ch. 260, Public Laws of 1925, which is prospective in effect.

APPEAL by defendant, Massachusetts Bonding & Insurance Company, from order of *Lane, J.*, March Term, 1925, MECKLENBURG. Affirmed.

Action on bond executed 22 July, 1922, by Porter & Boyd, Inc., as principal, and Massachusetts Bonding & Insurance Company, as surety, payable to the North Carolina State Highway Commission, said bond having been required by said Highway Commission of Porter & Boyd, Inc., as contractors for the construction of a highway located in Person County, North Carolina. Summons was issued in this action on 17 February, 1925. In their complaint, plaintiffs allege two causes of action, upon each of which they demand judgment on the bond against the defendant, Porter & Boyd, Inc., as principal, and Massachusetts Bonding & Insurance Company, as surety. On 6 March, 1925, defendant, Massachusetts Bonding & Insurance Company, moved before the clerk for an order removing the action from Mecklenburg to Person County for trial.

"For that it appears upon the face of the complaint that the contract out of which this suit arises was for work done and performed in the county of Person, State of North Carolina, and that under the terms and provisions of C. S., 2445, and amendments thereto, a surety must be sued on the bond given thereunder in the county where the work is done."

On 10 March, 1925, the said clerk denied said motion. Defendant having appealed therefrom to the judge presiding at the March Term, 1925, of said court, the said order was affirmed. From the order of the judge, defendant appealed to the Supreme Court.

Parker, Stewart, McRae & Bobbitt for plaintiffs.
J. F. Flowers for defendant.

CONNOR, J. Defendant, Massachusetts Bonding & Insurance Company, contends that Person County is the proper venue for the trial of this action, under C. S., 2445 and amendments thereto. The highway

constructed by Porter & Boyd, Inc., under contract with the North Carolina State Highway Commission is located in said county. The bond sued on was given to secure the performance by the principal of the contract to construct this highway. The contention, however, cannot be sustained. C. S., 2445, does not apply to an action on a bond given by a contractor to the State Highway Commission.

By virtue of chapter 260, Public Laws 1925, amending chapter 2, Public Laws 1921, an action on a bond given to the State Highway Commission by a contractor, since 10 September, 1925, must be brought in the county in which the highway is located, and only one action can be brought on such bond. This act was ratified 10 March, 1925, and has been in force and effect since 10 September, 1925, the date on which it became effective. Prior to said date, the venue for the trial of an action on a bond, given to the State Highway Commission by a contractor, was determined by C. S., ch. 12, Art. 7.

The order is

Affirmed.

APPEAL by defendant, Massachusetts Bonding & Insurance Company from order of *Lane J.*, March Term, 1925, MECKLENBURG. Affirmed.

Action on bond executed 16 January, 1922, by Porter & Boyd, Inc., as principal, and Massachusetts Bonding & Insurance Company, as surety, payable to the North Carolina State Highway Commission, and conditioned, among other things, that the principal "shall well and truly pay all and every person furnishing material or performing labor in and about the construction of a highway" which said principal had contracted with said State Highway Commission to construct in Mitchell County, N. C. Summons was issued on 17 February, 1925, returnable before the clerk of the Superior Court of Mecklenburg County. Plaintiffs allege in their complaint that they had advanced to Porter & Boyd, Inc., the sum of $14,422.30, for the payment of pay-rolls for laborers engaged in work on said highway in Mitchell County and that said pay-rolls had been duly assigned to them by the said laborers. They demand judgment that they recover of the principal and surety on said bond, the sum advanced, with interest and costs.

On 6 March, 1925, defendant, Massachusetts Bonding & Insurance Company, moved before the clerk for an order removing the action from Mecklenburg to Mitchell County for trial.

"1. For that it appears upon the face of the complaint that the contract out of which this action arises was for work done and performed in Mitchell County, North Carolina, and that under the terms and provisions of C. S., 2445 and amendments thereto, the surety must be sued on the bond given thereunder in the county where the work was performed.

"2. For that there is now pending in the Superior Court of Mitchell County an action entitled as follows: 'Jefferson Distributing Company, a corporation, in behalf of itself and all other creditors of Porter & Boyd, Inc., having a right to make themselves plaintiffs under the provisions of chapter 100, Public Laws 1923, of the State of North Carolina, v. Porter & Boyd, Inc., and Massachusetts Bonding & Insurance Company'; and that C. S., 2445, and amendments thereto, provide that only one action can be brought upon a bond such as the bond sued on in this case."

It was admitted by counsel, for the purposes of this motion, that an action entitled as above has been commenced and is now pending in the Superior Court of Mitchell County, and that said action is for the purpose of recovering upon the same bond as that upon which this action is brought.

The motion for removal was denied by the clerk; upon appeal from his order, to the judge presiding at the March Term, 1925, of said court, the order of the clerk was affirmed and the motion for removal was denied. From the order of the judge, defendant, Massachusetts Bonding & Insurance Company, appealed to the Supreme Court.

Parker, Stewart, McRae & Bobbitt, for plaintiffs.
J. F. Flowers for defendant.

CONNOR, J. C. S., 2445, as amended by chapter 100 of the Public Laws of 1923, providing that only one action shall be brought on bonds required by said statute, and that such action shall be brought in the county in which the building, road or street is located and not elsewhere, does not apply to a bond given by a contractor to the State Highway Commission. This statute applied only to bonds given to a county, city, town or other municipal corporation, as required therein. The State Highway Commission is not a municipal corporation, but is an agency of the State, created for the purpose of exercising administrative and governmental functions. *Carpenter v. R. R.*, 184 N. C., 400.

Plaintiffs are residents of this State, with their principal places of business in Mecklenburg County; defendant, Massachusetts Bonding & Insurance Company, is a nonresident of the State. Mecklenburg County is the proper venue for the trial of this action, and there was no error in declining to allow the motion for removal of the action to Mitchell County. C. S., 467 and 469. Chapter 260, Public Laws 1925, ratified on 10 March, 1925, and in force and effect since said date, does not apply to this action, which was commenced on 17 February, 1925, to recover upon a bond given by a contractor to the State Highway Commission on 16 January, 1922. An action on a bond given to the State

Highway Commission, commenced since 10 September, 1925, must be brought in one of the counties in which the work and labor was done and performed, and not elsewhere; only one action may now be brought on such bond. Reference is made to said chapter 260, Public Laws 1925, for the procedure in such action. This statute amends, not C. S., 2445, but chapter 2, Public Laws of 1921, which is the State Highway Act. It does not apply to actions commenced prior to 10 September, 1925.

There is no error and the order is

Affirmed.

STATE v. LOY SIGMON.

(Filed 16 December, 1925.)

1. Evidence—Statutes—Nonsuit—Motions.

Under the provisions of C. S., 4643, the defendant in a criminal action may have the case dismissed upon the insufficiency of the evidence, as in a civil action, C. S., 567, upon motion at the close of the State's evidence, or upon the whole evidence.

2. Same—Criminal Law—Burden of Proof.

A motion to dismiss or as of nonsuit upon the evidence in a criminal case, will be denied if sufficient, considered in the light most favorable to the State, to prove guilt of the defendant beyond a reasonable doubt.

3. Same—Reasonable Doubt.

The requirement that the evidence must be sufficient to convict beyond a reasonable doubt in criminal actions, is for the benefit of the defendant; and it requires the State to satisfy a jury to a moral certainty of the truth of the charge.

4. Appeal and Error — Criminal Law — Instructions — Presumptions—Record—Reasonable Doubt.

Where the defendant has excepted to the trial in a criminal action upon the evidence tending to show his guilt beyond a reasonable doubt, and the evidence thereon is sufficient, it will be presumed on appeal to the Supreme Court that the trial judge fully instructed the jury as to what constituted reasonable doubt as a matter of law, when the charge is not set out in the record.

5. Intoxicating Liquor — Spirituous Liquor — Statutes — Transporting—Possession.

Upon the trial for transporting intoxicating liquors in violation of our statute, the purpose of the possession of the intoxicants, or that they were for the purpose of profit, are immaterial, and the fact that the person accused is carrying them from one place to another is sufficient.

6. Intoxicating Liquor—Spirituous Liquor — Statutes—Transportation—Evidence—Questions for Jury.

Evidence tending to show that the defendant endeavored to conceal his car along a county highway at night, concealed himself from the officers of the law to whom he soon surrendered, when they were yet at the place; that his car contained no intoxicants, but when the back of the car was opened it smelt of whiskey; that several large bottles with a funnel that smelt of whiskey were found at the place; that another car passed down the road and stopped, and that while the officers were taking the defendant to jail the bottles and funnel had been taken away, is sufficient for conviction of unlawful transportation of spirituous liquor under the provisions of our statute. A load had been transported and the car was stopped with the implements ready to be reloaded.

7. Same—Possession.

Where the evidence is sufficient to convict the defendant of transporting whiskey under our statute, C. S., vol. III, 3411 (a) and (b), the transportation of spirituous liquor includes the possession.

8. Same—Issues—Consistent Verdict.

Where an indictment for violating our prohibition law contains a count as to the unlawful possession and also unlawfully transporting spirituous liquor, an acquittal upon the first is not inconsistent with a conviction on the second issue. They are two distinct offenses under the statute.

9. Evidence—Intoxicating Liquor—Spirituous Liquor—Smell.

Evidence by the smell in the rear of the car with other circumstances that an automobile had contained whiskey, having jugs, funnel, etc., as in this case: *Held*, sufficient to sustain a verdict of unlawfully transporting intoxicating liquor.

10. Same—Statutes—Per Cent of Alcohol.

Where the evidence is sufficient to convict the defendant of unlawfully transporting whiskey, it is presumed that when whiskey is spoken of that it contained more alcohol than one half of one per centum, prohibited by the statute.

APPEAL from *Shaw, J.*, and a jury, July Term, 1925, CATAWBA Superior Court. No error.

The defendant was tried on "a true bill" found by the grand jury, which was sent them by the solicitor of the district, Hon. R. L. Huffman, containing 8 counts. The only count that need be considered is the 4th, as follows: "The jurors of the State, upon their oath, do present, that Loy Sigmon, late of the county aforesaid, on the 12th day of June, 1925, with force and arms, at, and in the county aforesaid, unlawfully and wilfully did transport intoxicating liquors, against the form of the statute in such case made and provided and against the peace and dignity of the State."

The State offered the following evidence:

Tom Gabriel, testified: "I am chief of the police of the town of Newton; on Friday night, 12 June, in company with Mr. Curlee,

jailer, we went over in the west edge of town, near Albert Little's place on the sand-clay road leading into Newton from Saint Paul's Church, and just off the sand-clay road on a road that leads into Little's house, we found the car belonging to this defendant; I know him, his name is Loy Sigmon; his car was just off the main sand-clay road; by the side of car were three jugs, gallon jugs, all empty and with no odor about them at all; near the jugs was a funnel that smelled like it had had whiskey run through it; the cap of the defendant was hanging on the tail light of car; defendant was not there. Lights were on car; the rear of car had nothing in it; it was a Ford roadster, though there was a smell like whiskey in the rear of car; there was nothing else in car; after we had been there for few moments, defendant called to us to turn on lights and he would come out; this we did, and he came to car; we arrested him and took him to town; he gave bond and in a few minutes we went back to place and searched for whiskey; we found none; shortly after we got there, car passed and stopped up the road toward the church, and then car went on. There was no actual whiskey found in car, nor was there any, just the odors that I have told you about. Car that stopped up the road turned up there somewhere and then went toward Newton. It was not Sigmon's car that went up the road."

W. C. Curlee, testified: "I am jailer for Catawba County, live in Newton; on the night Mr. Gabriel testified about, he and I went out from Newton on the Saint Paul road and just off the road on road leading into home of Albert Little, a negro, we saw Ford roadster parked, with lights burning, it was about 9 o'clock in the nighttime; there was a cap hanging over the rear light on bracket that light is fastened to, front lights shining up the road toward Little's house; there was three empty jugs sitting in the road off from the car; there was nothing in the jugs and nothing had been in them so far as any smell was concerned, no liquor; there was a funnel lying near the jugs that smelled like it had had whiskey run through it; we searched the car, but there was nothing in it at all; we raised the cooter shell or back of the Ford, and it smelled like whiskey had been in there, that is, there was an odor like whiskey, but there was no whiskey in it at all; this cooter shell is in back of car and over the exhaust of motor and drive shaft. It was a wooden floor with open joints that you can see through; we found no whiskey; in few moments the defendant, I know him, his name is Loy Sigmon, called to us to turn on our lights so that he could get out, and we did and he came up to where we were; we arrested him and brought him to town. Just as we went up and while there I heard someone run down through the field; after we brought Sigmon to town and he gave bond we went back to search for whiskey, but we

found nothing, no cans or anything. While there, we heard car go up sand-clay road towards the church; stop and turn around and go back to town. That is all I know. It was not the Sigmon car, no, sir."

The defendant introduced no evidence, and, at the close of the State's evidence, moved for judgment as of nonsuit.

The jury rendered a verdict of "guilty of transporting intoxicating liquors." Judgment was rendered, exceptions and assignments of error were duly made by defendant, and appeal taken to the Supreme Court.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

Wilson Warlick for defendant.

CLARKSON, J. C. S., 4643, in part, is as follows: "When on the trial of any criminal action in the Superior Court, or in any criminal court, the State has produced its evidence and rested its case, the defendant may move to dismiss the action or for judgment of nonsuit. If the motion is allowed, judgment shall be entered accordingly; and such judgment shall have the force and effect of a verdict of 'not guilty' as to such defendant. If the motion is refused, the defendant may except; and if the defendant introduces no evidence, the case shall be submitted to the jury as in other cases, and the defendant shall have the benefit of his exception on appeal to the Supreme Court." Mason Act.

Defendant introduced no evidence. "The motion we are now considering was made under C. S., 4643, a statute which serves, and was intended to serve, the same purpose in criminal prosecutions as is accomplished by C. S., 567, in civil actions." *S. v. Fulcher,* 184 N. C., p. 665.

In *S. v. Rountree,* 181 N. C., p. 537, it was said: "Considering the testimony in its most favorable light to the State, the accepted position on a motion of this kind, we think his Honor properly submitted the case to the jury. *S. v. Oakley,* 176 N. C., 755; *S. v. Carlson,* 171 N. C., 818. The court's inquiry upon such a motion is directed to the sufficiency of the evidence to support or warrant a verdict. (*S. v. Hart,* 116 N. C., 976), and not to its weight or to the credibility of the witnesses. *S. v. Utley,* 126 N. C., 997."

In *S. v. Palmore,* 189 N. C., p. 541, it is held: "In *S. v. Starling,* 51 N. C., 367, *Pearson, C. J.,* approves the charge of *Shepherd, J.,* in the court below: 'Reasonable doubt, in the humanity of our law, is exercised for a prisoner's sake, that he may be acquitted if his case will allow it. It is never applied for his condemnation.' *Speas v. Bank,* 188 N. C., 528. In the interest of humanity, except in certain cases changed by statute, the accused is entitled to an instruction that the prosecution must prove the charge against him beyond a reasonable

doubt. In material or civil matters, ordinarily the rule is different—by preponderance or greater weight of the evidence."

In *S. v. Schoolfield,* 184 N. C., p. 723, reasonable doubt is defined: "A reasonable doubt is not a vain, imaginary, or fanciful doubt, but it is a sane, rational doubt. When it is said that the jury must be satisfied of the defendant's guilt beyond a 'reasonable doubt,' it is meant that they must be 'fully satisfied' (*S. v. Sears,* 61 N. C., 146), or 'entirely convinced' (*S. v. Parker,* 61 N. C., 473), or 'satisfied to a moral certainty' (*S. v. Wilcox,* 132 N. C., 1137), of the truth of the charge. *S. v. Charles,* 161 N. C., 287. If after considering, comparing, and weighing all the evidence the minds of the jurors are left in such condition that they cannot say they have an abiding faith, to a moral certainty, in the defendant's guilt, then they have a reasonable doubt; otherwise not. *Commonwealth v. Webster,* 5 Cushing (Mass.), 295; 52 Am. Dec., p. 730; 12 Cyc., 625; 16 C. J., 988; 4 Words and Phrases, 155."

In *S. v. Steele, ante,* 506, it is said: "We suggest, in addition to the definitions heretofore approved, for its practical terms, the following: 'A reasonable doubt, as that term is employed in the administration of criminal law, is an honest, substantial misgiving, generated by the insufficiency of the proof; an insufficiency which fails to convince your judgment and conscience, and satisfy your reason as to the guilt of the accused.' It is not 'a doubt suggested by the ingenuity of counsel, or by your own ingenuity, not legitimately warranted by the testimony, or one born of a merciful inclination or disposition to permit the defendant to escape the penalty of the law, or one prompted by sympathy for him or those connected with him.' *Jackson, J.,* in *U. S. v. Harper,* 33 Fed., 471."

The charge of the court below is not in the record. "In *Indemnity Co. v. Tanning Co.,* 187 N. C., p. 196, it was said: 'The presumption of law from the record is that the court below charged the law correctly bearing on the evidence as testified to by the witness at the trial.'" *In re Westfeldt,* 188 N. C., 705.

From the record it is presumed that the court below charged fully as to reasonable doubt, and gave defendant the full benefit of the definition as to what was the law in regard to reasonable doubt.

In *S. v. McAllister,* 187 N. C., p. 404, we quoted from *Cunard S. S. Co. v. Mellon,* 262 U. S., 100, opinion by *Mr. Justice Van Devanter,* who said: "Some of the contentions ascribe a technical meaning to the words 'transportation' and 'importation.' We think they are to be taken in their ordinary sense, for it better comports with the object to be attained. In that sense transportation comprehends any real carrying about or from one place to another. It is not essential that the carrying be for hire, or by one for another, nor that it be incidental to a transfer

of the possession or title. If one carries in his own conveyance, for his own purposes, it is transportation, no less than when a public carrier, at the instance of a consignor, carries and delivers to a consignee for a stipulated charge. See *U. S. v. Simpson,* 252 U. S., 465; 40 Sup. Ct., 364; 64 L. Ed., 665; 10 A. L. R., 510. 'Importation, in a like sense, consists in bringing an article into a country from the outside. If there be an actual bringing in, it is importation, regardless of the mode in which it is effected. Entry through a custom house is not of the essence of the act.'" McFadden on Prohibition (1925) sec. 282; Blackmore on Prohibition (1923), sec. 9. Possession may be actual or constructive. See *S. v. Myers, ante,* 239.

It is presumed that the court below charged fully as to what constituted "transporting intoxicating liquors."

In the present case the evidence of transportation was circumstantial. *Mr. Justice H. G. Connor,* in a carefully written opinion in *S. v. Wilcox,* 132 N. C., 1137, approved the charge of Hon. W. B. Councill, judge presiding, as follows: "'Circumstantial evidence is a recognized instrumentality of the law in the ascertainment of truth, and, when properly understood and applied, highly satisfactory in matters of gravest moment. Where such evidence is relied upon to convict it should be clear, convincing and conclusive in its connections and combinations, excluding all rational doubt as to the prisoner's guilt. . . . When such evidence is relied on for conviction every material and necessary circumstance must be established beyond a reasonable doubt, and the entire circumstances so established must be so strong as to exclude every reasonable supposition but that of guilt.'" *S. v. West,* 152 N. C., p. 832.

The charge in *S. v. Wilcox, supra,* was approved in *S. v. Stewart,* 189 N. C., 348.

From the record, it is presumed that the court below charged fully as to circumstantial evidence and gave defendant full benefit of the definition as to what was the law in regard to circumstantial evidence.

On the motion of defendant to nonsuit, the evidence is to be taken in the light most favorable to the State, and it is entitled to the benefit of every reasonable intendment upon the evidence and every reasonable inference to be drawn therefrom. *S. v. Sinodis,* 189 N. C., 567.

Counsel for defendant, in his able argument and brief, quotes from *S. v. Vinson,* 63 N. C., p. 338, and like cases: "We may say with certainty, that evidence which merely shows it possible for the fact in issue to be as alleged, or which raises a mere conjecture that it was so, is an insufficient foundation for a verdict, and should not be left to the jury." *Brown v. Kinsey,* 81 N. C., 245; *Byrd v. Express Co.,* 139 N. C., 273; *S. v. Prince,* 182 N. C., 788. We think this is the correct law of this jurisdiction.

Defendant further says: "It is respectfully contended that there was no testimony submitted by the State on which any reasonable idea may be founded that this odor, if coming from any whiskey or other substance above enumerated, or that any substance theretofore, contained as much as one-half of one per centum by volume, and it will be noted that there was no effort on the part of the State to prove that fact."

The witness Curlee, testified: "We raised the cooter shell or back of the Ford, and it smelled like whiskey had been in there, that is there was an odor like whiskey, but there was no whiskey in it at all."

"Knowledge for search without a warrant may arise from the sense of smell. *U. S. v. Borkowski,* 268 Fed., 408; *McBride v. U. S.,* 284 Fed., 416; *U. S. v. Kaplan,* 286 Fed., 963. . . . Sight is but one of the senses and an officer may be so trained that the sense of smell is as unerring as the sense of sight. *U. S. v. Borkowski, supra.*"

"This absolute personal knowledge can be acquired through the sense of seeing, hearing, *smelling,* tasting or touching." *S. v. Godette,* 188 N. C., p. 503.

Albert v. U. S. (C. C. A., 6th Cir., 1922), 281 Fed., 511, says, in part: "Whiskey is a well-known, distilled, spirituous, and intoxicating liquor. It is matter of common knowledge, of which we may properly take judicial cognizance, that whiskey, properly so-called, contains many times one-half of 1 per cent of alcohol. Recognition that distilled spirits are always intoxicating is found in *U. S. v. Standard Brewery,* 251 U. S., 210, 219, 40 Sup. Ct., 139, 64 L. Ed., 229; and, see *Ruppert v. Caffey,* 251 U. S., at page 298, 40 Sup. Ct., 141, 64 L. Ed., 260. It was clearly competent for witnesses familiar with liquor to testify, from the appearance, its smell, its taste, and its effect, that it was whiskey, and the fact that it was bought and sold, as such is evidence in the same direction."

C. S., vol. III, 3411 (a) and (b), (Public Laws 1923, chap. 1, known as the Turlington or Conformity Act) is, in many respects, the same as "The Volstead Act," although more stringent. Both acts make it unlawful to "transport" or "possess" liquor. The act defines "The word 'liquor' or the phrase 'intoxicating liquors' shall be construed to include 'alcohol, brandy, whiskey, rum, gin, beer, ale, porter and wine, and in addition thereto any spirituous, vinous, malt or fermented liquors, liquids, and compounds, whether medicated, proprietary, patented, or not, and by whatever name called, containing one-half of one per centum or more of alcohol by volume, which are fit for use for beverage purposes," etc.

Defendant contends that as he was only found guilty of "transporting liquors," on the fourth count, the third count was for "possession," and the findings of guilty of transporting automatically rendered a verdict of not guilty on the other counts in the bill and the one for

"possession." This is true. The defendant further contends, as we construe it, that a party could not be guilty of transporting unless likewise guilty of possession. The offenses are designated in the statute separately, and while the jury would have been fully justified in finding the defendant guilty on both counts, under the evidence in this case, their failure to do so, does not, as a matter of law, vitiate the verdict on the count for transporting. It goes without saying that the jury would have to find, from the circumstantial evidence, that defendant had in his possession liquors that he was transporting before they could convict him.

We think the facts were more than a scintilla and sufficient to be submitted to the jury; the probative force was for them. The facts succinctly: The chief of police of Newton with the jailer went to the west edge of Newton, on a sand-clay road leading into Newton from St. Paul's Church, and left this road and took a road that leads to Albert Little's place—about 9 o'clock at night. Just off the sand-clay road that leads to Little's place, they found defendant's car, a Ford roadster, parked in the road. The back of the car was towards the sand-clay road. Defendant was not there, but his cap was hanging on the tail or rear light of the car. The lights were on, the front lights shining up the road towards Little's house. By the side of the car were three one-gallon jugs, empty, no odor about them. Near the jugs was a funnel that smelled like it had had whiskey run through it. The car was searched and there was nothing in it. "We raised the cooter shell or back of the Ford, and it smelled like whiskey had been in there, that is there was an odor like whiskey, but there was no whiskey in it at all." In a few minutes defendant called to us to turn on our lights so he could get out. He came up and was arrested. Just as the officers went up they heard some one run down through the field. The officers brought defendant to town. He gave bond and they, in a short while, went back, to search for whiskey, they found no cans or anything. While there they heard a car that was not defendant's go up the sand-clay road towards the church, stop, turn around and go back towards Newton.

The evidence clearly indicates and sufficient for the jury to believe beyond a reasonable doubt, that defendant had been transporting liquors in the back of the Ford roadster. While the officers opened it up "it smelled like whiskey had been in there." Near the car were 3 empty one-gallon jugs to be filled up, nothing had been in them. The funnel near the jugs smelled like it had had whiskey run through it. No doubt it had been used before and was ready to be used to fill the jugs. Defendant had parked his machine, he left it so no one would easily see him from the sand-clay road. The rear was to the sand-clay road and his cap concealed the rear light. His front lights shone up the road

towards Little's house, so he could see where to go. He had evidently left the car to go after another supply. Some one ran through the field as the officers went to where the car was parked—no doubt his confederates. The officers arrested defendant and brought him to Newton and went back, found no cans or anything. While there a car other than defendant's went up the sand-clay road towards the church, stopped, turned around and went back towards Newton. From the facts and circumstances, there was sufficient evidence for the jury to find beyond a reasonable doubt that not only defendant was "transporting liquors," but he had confederates and had been getting the liquor and had sold out and gone back to them to get another load. He had all the implements of a blind-tiger transporting liquor. The officers caught him before he had gotten his new supply. A grand jury of at least twelve men found a true bill against him on the evidence—a petty jury of 12 found him guilty beyond a reasonable doubt. The judge before whom he was tried thought there was sufficient evidence to go to the jury. At least 24 jurors—"such persons as have paid all the taxes assessed against them for the preceding year and are of good moral character and of sufficient intelligence"—and a judge have carefully considered the evidence. We think the facts sufficient to have been submitted to the jury—the probative force was for them.

The Legislature of North Carolina, part C. S. (vol. III), 3411 (b), has said: "And all the provisions of this article shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented." This provision is the wisdom of ages. Solomon, the wisest man (Prov., chap. 23, v. 29, 32) said: "Who hath woe? who hath sorrow? who hath contentions? who hath babbling? who hath wounds without cause? who hath redness of eyes? They that tarry long at the wine; . . . At the last it biteth like a serpent, and stingeth like an adder."

Shakespeare, has said: "Oh God, that men should put an enemy in their mouths to steal away their brains." We find

No error.

RIVERVIEW MILLING COMPANY v. STATE HIGHWAY COMMISSION.

(Filed 16 December, 1925.)

1. Evidence—Witnesses—Cross-Examination.

One of the purposes of cross-examining a witness is to render more definite and certain his testimony, and to expose any bias or uncertainty the witness may have with regard to his statements made on his direct examination, so that the evidence will be more valuable to the jury in determining the facts at issue.

2. Same—Rights of Party.

The opposing party has a right to cross-examine the witnesses testifying against him, and such is not a mere privilege.

3. Instructions—Construed as a Whole—Appeal and Error.

An instruction in an action by the owner to recover damages for the taking of his lands for a public use by condemnation, is not held for reversible error, when from the charge as a whole in its connected parts, it appears that the court has fully instructed them upon the measure of damages in terms they could not reasonably have misunderstood.

4. Highways—Condemnation—Damages—Loss of Profits.

The owner of a water mill acquiring rights of ingress and egress for his customers upon the lands of others and the construction of a bridge and maintenance of a ferry situated to command a large patronage for his mill, brought an action against the State Highway Commission for damages to these right of ways by the building of a State highway and bridge, and alleged his land on which the mill was operated became greatly less profitable and sought to recover damages for the taking of his property: *Held*, damages to his property and property rights were the sole ground of his recovery of damages, and loss of profits to his mill was speculative and too remote.

5. Instructions—Statutes—Incidental Matters—Special Requests—Appeal and Error.

While the judge is required by C. S., 564, to instruct the jury as to the law arising on the evidence in the case, it is not error for him to omit to charge upon purely incidental matters, and his failure to do so in the absence of a special request for correct special instructions, is not reversible error.

APPEAL by petitioner from STANLY Superior Court. *McElroy, J.*

Proceedings instituted before the clerk to assess damages in favor of the petitioner on account of the taking of petitioner's property for a State highway, and damages to other property not taken. From a judgment on a jury verdict in favor of respondent, petitioner appeals. No error.

The petitioner is the owner of certain properties situated on Rocky River in the counties of Stanly and Anson. On this property is situated a roller mill and mills, for meal, feed and other grain products, operated by water power supplied by dams across Rocky River. At the point where the mills are situated there is an island in the river extending above and below the mills. The old highway leading from Salisbury to Cheraw crosses Rocky River at the place where the mills are situated. About half a mile south of the mills and at the lower point of the island the petitioner also owned and operated a ferry, as well as a low-water toll-bridge. This ferry had been owned and operated by the petitioner, and those under whom it claims, for a long time. The ferry was used in case of high water when vehicles could not ford the river at

the mills. Petitioner had also certain right of ways over which it maintained roads leading from the old Salisbury and Cheraw highway at the mills to the ferry, on each side of the river. When the river was up, travel would leave the regular highway and go by petitioner's private roads to the ferry and cross the river and then by another private road of the petitioner, back to the highway. An island in Rocky River, immediately below the ferry, left only a narrow opening between the two islands through which the ferry was operated. When the river was low, it could be forded with wagons and buggies at the mills and the ferry would not be operated on account of the shoals in the river. When automobiles came into use they could not ford the river in as deep water as wagons and buggies, and, usually, when they could not cross the river on the ferry, because of shallow water, there was enough water to prevent them from fording the river. This condition caused the petitioner to erect a low-water bridge at the ferry site, using, on both sides of the river, the same entrance to the bridge and the ferry. This was a narrow pass-way, some 20 or 30 feet wide, leading from the high land to the water's edge. Low vehicles could cross on the low-water bridge, when the water was low, but when it rose and was over the bridge, they used the ferry. Petitioner offered evidence tending to show that by these two methods it was able to take care of the travel practically all the time, so that in time of both high and low water, the travel must needs go by the petitioner's mills. This gave the petitioner's mills much advertisement. Petitioner kept and successfully served a large volume of trade. The petitioner did not own any land at the ferry, except the right of ways and privileges of maintaining and operating the ferry. On the Stanly side of the river, petitioner's private road passed from the mill on beyond the ferry into the lower section of Stanly County whence came a great volume of patronage to the petitioner's mill.

Petitioner contends that, in 1921 the State Highway Commission decided to build a highway bridge across Rocky River between the counties of Anson and Stanly, and that its engineers located this highway bridge on the site of petitioner's ferry and low-water bridge, and that the State Highway Commission did not attempt to buy or condemn the location, but proceeded to build its bridge and complete it and open it for travel 22 May, 1923. Petitioner further contends that, in building this bridge and its approaches, the respondent cut off the road leading from petitioner's mill to the ferry and into the lower part of Stanly County; that where the bridge crosses the road a fill 23½ feet high was made, and that the fill and piers leading from the road to the river occupied petitioner's right of way which went to the ferry and bridge; that on the Anson side the respondent constructed a pier in petitioner's road as it led

from the river to the high land; that respondent utilized or rendered useless all the property petitioner had at that location, cutting off its roads that led to the low-water bridge on both sides and made it impossible on the Stanly side to get from the highway bridge down to the road leading from the bridge to the mill, and made it impossible for its customers coming from the lower part of the county to the mill to use the old road. It was further contended that the customers coming from the lower part of Stanly County were thus required to make a wide detour, several miles further than the original way of travel, and those from Anson County that crossed on the highway bridge had to go a mile or more by the new roads into Stanly County and then turn to the mill.

The petitioner claims damages for the taking of its property and property rights and for the damage resulting to its property not so taken.

The defendant contended that, while the petitioner owned the property and rights alleged in the petition, it did not locate its highway bridge on the identical site of the low-water bridge and ferry and that the petitioner used its ferry up to and including the day on which the highway was opened for travel and that petitioner was not damaged, for that the general and special benefits accruing to petitioner from the building of the highway were more than sufficient to offset any damages claimed, and that the real claim of petitioner was not for compensation for taking property and not for damages directly resulting to other property, but was an effort to obtain reimbursement for the inevitable result flowing from the building of a modern dependable highway, including a concrete bridge across Rocky River, so constructed that its floods would not interfere with the travel, but interfered with what defendant terms, "petitioner's private monopoly," which it had enjoyed on account of the lack of transportation facilities by which competition with it could function.

The verdict was as follows:

"1. What damage, if any, is the petitioner entitled to recover of the defendant by reason of the appropriation of a portion of the land of the petitioner by the defendant for the use of the State highway and bridge described in the petition? Answer: Not any.

"2. What benefit either general or special, or both, if any, has accrued to the lands of the petitioner by reason of the construction of the State highway and bridge described in the petition? Answer: Nothing."

There was no exception to the issues submitted.

Manly, Hendren & Womble and R. L. Smith & Son for petitioner.
Assistant Attorney-General Ross for respondent.

VARSER, J. The petitioner assigns error (1, 2, 3) in permitting counsel for respondent to ask the witness Hathcock, president of petitioner, certain questions as to what, in his opinion, would have been petitioner's damages if the State highway bridge had been built below petitioner's ferry. The witness answered that he did not think the ferry would be worth much if a free way to cross had been provided. The same kind of evidence was elicited on redirect examination. This witness had previously given his opinion as to the damages suffered by petitioner on account of the building of the bridge. The same kind of evidence was elicited from petitioner's witness, Freeman, and petitioner objected. The damages sought was for the taking of property, but the evidence for petitioner on direct examination tended to show that the value of the property taken, and the resultant damages to its other property was considerable because the highway bridge rendered it inaccessible to the trade, and reduced its value seriously.

It was not a question of what the State Highway Commission might have done, or how much petitioner would have been damaged under other circumstances, but it was a question of damages, certain, definite, not remote, and compensation for property, and property rights taken. The office of cross-examination is to sift, and test, and purge from the adversary's witnesses the elements composing their estimates of damages.

The questions were competent on cross-examination. They show a skillful appreciation and use of the advocate's valuable art of cross-examination.

The right to have an opportunity for a fair and full cross-examination of a witness upon every phase of his examination-in-chief, is an absolute right and not a mere privilege. *S. v. Hightower,* 187 N. C., 300, 310; *Mining Co. v. Mining Co.,* 129 Fed., 668. Cross-examination "beats and boults out the truth much better than when the witness only delivers a formal series of his knowledge without being interrogated." (*Sir Matthew Hale, L. C. J.* History of the Common Law, ch. 12.) In *S. v. Morris,* 84 N. C., 764 (1881), *Ruffin, J.,* says: "All trials proceed upon the idea that some confidence is due to human testimony, and that this confidence grows and becomes more steadfast in proportion as the witness has been subjected to a close and searching cross-examination; and this because it is supposed that such an examination will expose any fallacy that may exist in the statement of the witness, or any bias that might operate to make him conceal the truth; and trials are appreciated in proportion as they furnish the opportunities for such critical examination." The questioning was also proper to elicit whether the witnesses had any bias. Wigmore on Evidence, (2 ed.), par. 1367 and note; Lockhart's Handbook on Evidence, sec. 270; *Toole v. Michael,* 43 Ala., 406, 419.

In *Rice v. R. R.*, 167 N. C., 1, the court allowed the question: "If you clean the sewer out, will it drain the land?" There was evidence that the drain pipes had been allowed to clog up, and that damages resulted therefrom. It was allowed as tending to fix the cause of the damage. In the case at bar the converse was clearly competent.

The petitioner in its fourth assignment of error complains at the charge to the jury in the following excerpt: "That plaintiff's charter as a ferryman was granted to, held and exercised by, the plaintiff, subject to the inherent right of the State to erect a public bridge across Rocky River at any time and place it might desire, regardless of the effect it might have on the tolls and emoluments received by the plaintiff from said ferry and toll bridge."

It is contended that the words "at any time and place," in its connection, led the jury to believe that the State Highway Commission could take petitioner's property without compensation.

The charge must be considered contextually and not disjointedly. *In re Creecy, ante,* 306; *Davis v. Long,* 189 N. C., 129, 133; *Mangum v. R. R.,* 188 N. C., 689, 701; *Cobia v. R. R.,* 188 N. C., 487, 493; *Exum v. Lynch,* 188 N. C., 392; *In re Hardee,* 187 N. C., 381; *S. v. Dill,* 184 N. C., 645, 650; *S. v. Jenkins,* 182 N. C., 818, 820; *S. v. Jones,* 182 N. C., 781, 787; *White v. Hines,* 182 N. C., 275, 289; *S. v. Chambers,* 180 N. C., 705, 708; *Haggard v. Mitchell,* 180 N. C., 255, 258; *In re Hinton,* 180 N. C., 206, 214; *S. v. Wilson,* 176 N. C., 751, 754; *Lumber Co. v. Lumber Co.,* 176 N. C., 500, 503; *Taylor v. Power Co.,* 174 N. C., 583, 588; *Leggett v. R. R.,* 173 N. C., 698, 699; *Kistler v. R. R.,* 171 N. C., 577, 579; *Deligny v. Furniture Co.,* 170 N. C., 189, 203; *Montgomery v. R. R.,* 169 N. C., 249; *Padgett v. McKoy,* 167 N. C., 504, 507; *McNeill v. R. R.,* 167 N. C., 390, 395; *S. v. Robertson,* 166 N. C., 365; *S. v. Ray,* 166 N. C., 420, 434; *Hodges v. Wilson,* 165 N. C., 333; *Bird v. Lumber Co.,* 163 N. C., 162, 167; *S. v. Vann,* 162 N. C., 541; *S. v. Tate,* 161 N. C., 280; *S. v. Exum,* 138 N. C., 599; *S. v. Lewis,* 154 N. C., 632, 634; *Kornegay v. R. R.,* 154 N. C., 389, 392; 2 Thompson on Trials, sec. 2407.

Measured by this rule or by the language itself, the charge could not have any prejudicial effect. Petitioner does not challenge the correctness of the proposition of law contained in the excerpt, but fears that the reference to the right of the State to exercise its sovereignty through the respondent *at any time and place,* might have prejudiced it. The charge is clear and full as to damages, expressly stating that the petitioner was entitled to the fair market value of the property taken and to all the damages flowing proximately and directly to its other property from such taking.

In the light of the careful and painstaking explanation of the plaintiff's right to recover damages, which appears in the charge, no possible prejudice could have resulted in this regard to the petitioner.

In petitioner's fifth assignment of error, the petitioner complains because the court, in giving to the jury the measure of damages to the property not taken, limited the measure to the impairment in value flowing directly and proximately to the plaintiff's property by reason of the taking for the construction of a bridge and highway at the point where it was constructed. The respondent in locating its road did not touch the 25 acres of land comprising the petitioner's mill site. Its location was some 1500 feet from it. The witness Hathcock, petitioner's president, testified in specifying his damages by way of depreciation of property not taken, says that it was caused by the fact that the highway was built leaving petitioner's mill property remote from it—no way to get out without greatly increased distance—puts petitioner's patronage in closer touch with its competitors who are on the highway. The highway provided a shorter way of travel somewhere else and a longer way to petitioner's mill. If the highway had been located right by petitioner's mill, it would have been a fine advertisement for it. Petitioner had been deprived of the public road; its income taken; the distance for its travel to go in and out increased, as well as the difficulty. "There is no other damage done to the mill property, except the fact that it was left off of the new road, that I think of right now."

In the light of these contentions and the evidence relating thereto, it was necessary for the court to charge the jury so that they could separate the damages, if any, resulting to petitioner's property rights and its damages claimed which are the necessary results of the changing conditions in business life. In *Elks v. Comrs.*, 179 N. C., 241, the Court, through *Clark, C. J.*, affirming *Lanier v. Greenville,* 174 N. C., 313, says: "We have adhered to the rule that, in the assessment of damages for land taken for public improvement, the measure of damage is the difference in value before and after taking." Anent a similar contention in that case, the Court approving the instruction directing the jury not to take into consideration the fact that plaintiff's home is off the road, because the action was not brought by reason of the house being cut off of the road, but by reason of taking a portion of his land through which the road passes, says: "The plaintiff still has the old county road to use as he did previously to laying out this road, except that he himself has built a tobacco barn across it, as shown on the map, and in that respect he can recover no damage by reason of laying out the new road. If he could, then any other person living 4 or 5 miles, or farther, from the new road, could contend that they were entitled to damages because the new road was not constructed by their home."

There is ample authority given by the pertinent statutes, which are: Public Laws 1921, chap. 2 (including C. S., chap. 33, Eminent Domain); Public Laws, Extra Session, 1921, chap. 7; Public Laws 1923, chaps. 160, 247, 263; Public Laws, Extra Session, 1924, chap. 16; Public Laws 1925, chaps. 45 and 133. When such authority is used with due care and diligence in its performance, the respondent is not responsible for purely consequential damages, such as contended for by the petitioner in the deflection of its patronage and depriving it of a highway by its mill door, and the increase in its distance, from a dependable all-weather, hard-surfaced road and modern bridge, free and without tolls. *Dorsey v. Henderson,* 148 N. C., 423; *Hoyle v. Hickory,* 164 N. C., 79; *Wood v. Land Co.,* 165 N. C., 367; *Munday v. Newton,* 167 N. C., 656.

We conceive the charge in its entirety to comply with the rule laid down in *R. R. v. Armfield,* 167 N. C., 465; *R. R. v. McLean,* 158 N. C., 498; *Lambeth v. Power Co.,* 152 N. C., 371; *Abernathy v. R. R.,* 150 N. C., 97; *Brown v. Power Co.,* 140 N. C., 333; *Lloyd v. Venable,* 168 N. C., 531, and in *R. R. v. Mfg. Co.,* 169 N. C., 156, as applying to the instant case. The charge of the court meets the rules laid down in these well-considered cases, in so far as the facts are similar. The test is the effect of the taking on the value of the property connected with the property taken. It is pecuniary and not sentimental, problematical or uncertain, and does not include the income dependent upon the trade or custom of a flour mill; but in so far as these elements affect and diminish the value of the property as a direct and proximate result of the taking, they are competent, and the charge of the court below so allowed the jury to apply the evidence, if accepted by it.

Petitioner assigns error for that the court failed to instruct the jury on certain incidental phases of the evidence, such as the nature and value of the franchise and easements owned by petitioner, and taken by respondent, and as to the necessity of the effort to agree with the owner. These questions were incidental and not such as to come within the duty of the Court under C. S., 564. The law applicable to the determinative contentions arising upon the evidence has been given (*Richardson v. Cotton Mills,* 189 N. C., 655; *S. v. Thomas,* 184 N. C., 757), and the careful and painstaking effort of the learned trial judge to comply with his duty in the instant case, is such as not to cause prejudice to petitioner's rights by any omission of material matter necessary for a comprehensive understanding by the jury of the principles laid down for their guidance, and meets fully the requirement in *Butler v. Mfg. Co.,* 182 N. C., 547; *Real Estate Co. v. Moser,* 175 N. C., 259; *Jarrett v. Trunk Co.,* 144 N. C., 299; *Rook v. Horton, ante,* 184.

If the petitioner desired further instructions, or a particular phase of the testimony or contentions to be presented to the jury, or more fully explained to them, it was its duty to submit special prayers for instructions to the desired effect. *Trust Co. v. Velverton,* 185 N. C., 314; *Indemnity Co. v. Tanning Co.,* 187 N. C., 190; *Construction Co. v. R. R.,* 185 N. C., 43; *Currie v. Malloy,* 185 N. C., 206.

We can perceive in the charge and in the conduct of the trial, no prejudicial error. Therefore, let it be certified that there is

No error.

J. C. LEIGH v. WESTERN UNION TELEGRAPH COMPANY.

(Filed 16 December, 1925.)

1. **Telegraphs—Error in Transmission—Negligence—Prima Facie Case.**

Where a telegraph company receives a message for transmission and delivers it with its wording or meaning changed, a prima facie case of negligence is made out against it, and casts upon the defendant the *onus* of showing to the contrary.

2. **Telegraphs—Negligence—Error in Transmission—Contracts—Futures—Ratification.**

Where a telegraph company accepts for transmission and delivery a message to cotton brokers to buy cotton for future delivery upon condition that an expected government report shows a certain shortage in crop, and the message is delivered omitting the condition of purchase, and the commission man buys at a price that is productive of loss to the sender of the message who thereafter with knowledge of the error accepts the purchase and orders his brokers to sell upon the open market to his loss, the resultant loss is not proximately caused by the negligence in the transmission of the message, and the seller cannot recover it from the telegraph company.

3. **Same—Principal and Agent.**

Where a telegraph company erroneously transmits and delivers to cotton exchange brokers a telegram to purchase cotton futures on the cotton exchange, the minds of the sender and the seller of the cotton do not come to an agreement necessary to a valid contract: *Semble,* a telegraph company is not the agent of the sender of a telegram so as to bind him to a contract that he has not made, through error in transmission.

APPEAL by defendant from judgment of Superior Court of MOORE County, February Term, 1925, *Bryson, J.,* presiding. Reversed.

Action to recover damages, alleged to have been sustained by plaintiff, resulting from negligence of defendant in the transmission and delivery of a telegram. On 1 September, 1922, plaintiff delivered to defendant,

at Hamlet, N. C., for transmission to the sendee, a telegram addressed to Hubbard Brothers & Company, New York, and signed by plaintiff, reading as follows:

"If Government report fifty-six or under buy two hundred bales December one thousand dollars deposited Page Trust Company, Hamlet, N. Car., your credit. Answer."

On same day, a telegram addressed and signed as above was delivered by defendant to Hubbard Brothers & Company, reading as follows:

"Fifty-six or under buy two hundred bales December one thousand dollars deposited Page Trust Company, Hamlet, N. Car., your credit. Answer."

The words, "If Government report," appearing in the telegram filed by plaintiff at Hamlet, N. C., with defendant, did not appear in the telegram delivered by defendant to Hubbard Brothers & Company in New York. Defendant's agent at Hamlet failed to include said words in the telegram transmitted by him. No telegram including these words was transmitted and delivered to Hubbard Brothers & Company by defendant.

Hubbard Brothers & Company are brokers engaged in business in New York City. They buy and sell cotton, for customers, on commission, on the New York Cotton Exchange. On 1 September, 1922, a report on the condition of the cotton crop by the United States Government was expected. It is the custom of the Government to issue such reports from time to time. The price of cotton is usually affected by these reports. The telegram filed by plaintiff with defendant, at Hamlet, N. C., including the words, "If Government report," preceding the words, "fifty-six or under," was intended by plaintiff, and if same had been delivered to them by defendant, would have been understood by Hubbard Brothers & Company as an order that if the Government report, expected that day, showed the condition of the crop to be fifty-six per cent or under of the normal crop, they should buy for plaintiff two hundred bales of cotton to be delivered during the month of December following; the order to buy said cotton was conditioned upon the report showing that the crop was fifty-six per cent or under of a normal crop.

Upon the opening of the market on 1 September, 1922, cotton for December delivery was selling at 22.85 cents per pound; the price fluctuated during the day between 22 and 23 cents. The telegram, which did not include the words, "If Government report," before the words, "fifty-six or under," was delivered to Hubbard Brothers & Company on the floor of the Cotton Exchange at 10:18 a. m.; they understood the

telegram delivered to them to be an order from plaintiff to buy for him two hundred bales of cotton for December delivery at 22.56 cents per pound or under; they purchased said cotton for plaintiff at 22.50 and thereupon sent plaintiff a telegram by the defendant company as follows:

J. C. Leigh,
Hamlet, N. C.
Bought two December 22.50.

HUBBARD BROTHERS & COMPANY.

This telegram was delivered to plaintiff soon after its receipt at defendant's office at Hamlet, at 11:27; at 12:17 p. m. plaintiff filed with defendant for transmission to sender, telegram as follows:

Hubbard Brothers & Company,
New York, N. Y.
My wire to you this morning was "if Government report was 56 or under buy two December." Evidently error in your buying at 22.50. Advise. J. C. LEIGH. (12:10 p. m.)

This telegram was received by Hubbard Brothers & Company in New York, who filed reply thereto as follows:

J. C. Leigh,
Hamlet, N. C.
Your order plainly read fifty-six or under buy two hundred December. You made no mention of Government. This was plainly a limited order which we executed at fifty. HUBBARD BROTHERS & COMPANY.

This telegram was received at Hamlet, N. C., at 12:47 and thereafter delivered to plaintiff.

The New York Cotton Exchange closed on Friday, 1 September, 1922, at 2 p. m., and did not open for business until Tuesday, 5 September (the intervening Monday being Labor Day, was observed as a holiday).

At 6:52 p. m. Hubbard Brothers & Company sent plaintiff a night letter as follows:

J. C. Leigh,
Hamlet, N. C.
Naturally feel sorry that we did not interpret your order as you meant it but feel sure you accept our point of view. Have shown your order to several brokers and they all agree that it read to buy two December at a limit of fifty-six as nothing whatever was said about Government report, though you undoubtedly meant it when you wrote it out.

HUBBARD BROTHERS & COMPANY.

Upon receipt of this night letter, plaintiff learned for the first time that the words, "If Government report" were not included in the telegram delivered by defendant to Hubbard Brothers & Company, and that Hubbard Brothers & Company had bought the cotton pursuant to a telegram received by them from which said words were omitted. Plaintiff thereupon wrote a letter to Hubbard Brothers & Company, and sent same with copy of his telegram as filed at Hamlet by mail. By this letter he authorized Hubbard Brothers & Company to close out the contracts. This they did on Tuesday morning, upon the opening of the Cotton Exchange, at a loss of $850, which they charged to plaintiff's account. They also charged to said account a commission of $50, and the war tax on the transaction, amounting to $4.36. The total amount thus charged was $904.36. Plaintiff testified that if the price of cotton had gone up he would have had the option of taking the cotton, or selling his contracts; that he would have tried not to lose anything; that he was not in this business for his health.

The Government report on 1 September, 1922, showed that the condition of the cotton crop was 57.2. When the report was published at noon on that day, plaintiff left the telegraph office, because, as he said, he knew he had no order in to buy cotton.

Defendant, as a separate and partial defense to plaintiff's action for damages, alleged that the message referred to in the complaint was delivered to and accepted by defendant subject to the terms of its standard message contract, by which defendant's liability for damages resulting from mistakes, or delays in the transmission or delivery, or from nondelivery of any message received for transmission at the unrepeated message rate was limited to $500; that said message was received by defendant for transmission at the unrepeated message rate.

The issues submitted to and answered by the jury were as follows:

1. Did the defendant negligently fail to properly transmit and deliver the telegram as alleged in the complaint? Answer: Yes.

2. If so, was plaintiff injured thereby? Answer: Yes.

3. Was said telegram sent under the terms of the contract and agreement as set out in the answer? Answer: No.

4. What damages, if any, is plaintiff entitled to recover? Answer: $904.36, and interest from 1 September, 1922.

From judgment upon this verdict, defendant appealed.

H. F. Seawell for plaintiff.

C. W. Tillett and Rose & Lyon for defendant.

CONNOR, J. At the close of all the evidence, defendant renewed its motion for judgment as of nonsuit, first made at the close of plaintiff's

evidence and then overruled. C. S., 567. Defendant's first assignment of error is based upon exceptions to the refusal of the court to allow this motion. Defendant also, in apt time, requested in writing, that the court charge the jury, "That upon all the evidence, the jury should answer the second issue 'No.'" The court refused to give this instruction, and defendant, having excepted to such refusal, assigns the same as error. Defendant thus presents its contention that in no event, upon the evidence, can plaintiff recover in this action the loss sustained by him upon the sale of the cotton purchased for him by Hubbard Brothers & Company.

There is no contention by defendant that it transmitted and delivered the telegram as written and filed by plaintiff at Hamlet, N. C. It is admitted that the telegram transmitted and delivered to Hubbard Brothers & Company, at New York, did not include the words, which made the telegram, as filed by plaintiff at Hamlet, a conditional order to the brokers to buy cotton. The words, "If Government report," before the words "fifty-six or under" were omitted from the telegram delivered to Hubbard Brothers & Company. The failure to transmit and deliver the telegram, including these words, was evidence of negligence, sufficient to be submitted to the jury, upon the first issue. "It is well settled that where a telegraph company receives a message for delivery and fails to deliver it with reasonable diligence, it becomes prima facie liable, and that the burden rests upon it of alleging and proving such facts as it relies upon to excuse its failure." *Hendricks v. Telegraph Co.,* 126 N. C., 309, cited and approved in *Willis v. Telegraph Co.,* 188 N. C., 114; *Strong v. Telegraph Co.,* 22 Anno. Cas., 1912A, 55.

Plaintiff, however, cannot recover of defendant the loss sustained by him, upon the sale of the cotton, unless the failure of defendant to transmit and deliver his telegram, containing a conditional order to buy cotton, was the proximate cause of such loss. The delivery by defendant to Hubbard Brothers & Company, of a telegram, which was a limited order to buy cotton and which plaintiff had not filed with defendant, did not authorize the brokers to buy cotton for plaintiff at 22.50 and plaintiff was not bound by the contract made by Hubbard Brothers & Company. The two hundred bales of cotton for December delivery bought by Hubbard Brothers & Company at 22.50 was not plaintiff's cotton until after full knowledge that defendant had failed to transmit and deliver his telegram, which was a conditional order to buy; he ratified the purchase by his brokers by authorizing them to sell the cotton for him. *Starnes v. R. R.,* 170 N. C., 222. The loss sustained by him, upon the sale of the cotton, on Tuesday morning, was not the result of the failure of defendant to transmit and deliver the telegram, which included the words, "If Government report" before the words, "fifty-six or under,"

but was the result of plaintiff's acceptance of the cotton purchased by his brokers for him, without previous authority from him. It became his cotton upon his ratification of the act of his brokers, and as he would have been entitled to any profit, which a rise in the price of cotton might have brought him, he must sustain the loss resulting from a sale when the price of cotton had gone down. Plaintiff entered upon the transaction, not "for his health," but with full knowledge of the hazards incident to it. His loss was one of the casualties of the business.

The facts which the evidence in this case tend to establish are almost identical with the facts in the case of *Cotton Oil Co. v. Telegraph Co.*, 171 N. C., 705. In the latter case, plaintiff delivered to the telegraph company at Mount Gilead, N. C., a message for transmission to John Kearns, at Wagram, N. C., offering twenty dollars per ton for cotton seed to be purchased by the said Kearns; the message delivered to Kearns included the word "two" after the word "twenty," making the offer "twenty-two dollars per ton" instead of "twenty." Acting upon the telegram delivered to him, Kearns bought four car loads of cotton seed, paying for same a price which he would not have paid had the offer in the telegram delivered to him been "twenty" instead of "twenty-two" dollars per ton. Plaintiff discovered the error made by the telegraph company the next day and countermanded the order to Kearns. Plaintiff paid Kearns for the cotton seed purchased by him prior to the discovery of the error, and then brought suit against the telegraph company for the amount paid Kearns in excess of the amount which it would have paid at twenty dollars per ton, claiming this amount as its damage, resulting from the erroneous transmission of its telegram.

This Court held, in the opinion written by the late *Chief Justice Hoke*, that the plaintiff could not recover of the telegraph company, as damages, the amount paid to Kearns in excess of the amount which it would have paid for the seed at twenty dollars per ton for the reason that plaintiff was not liable to Kearns for this amount, and that the payment to him of said amount was voluntary and made after the discovery by plaintiff of the error in the telegram. Plaintiff was not liable to Kearns for seed purchased by him under the telegram delivered to him, containing an offer of twenty-two dollars per ton. The seed so purchased were not plaintiff's seed until plaintiff, with full knowledge of the facts accepted them, and thereby ratified the offer of twenty-two dollars as contained in the erroneous telegram. The error in the telegram as transmitted was not the proximate cause of loss to plaintiff, as alleged.

In his opinion, *Judge Hoke* cites with approval the "learned and forcible opinion" of *Judge Folkes*, in *Pepper v. Telegraph Co.*, 87 Tenn., 554. In that case, plaintiff, engaged in business as produce dealers at Memphis, Tenn., had filed with the telegraph company a telegram to be

transmitted and delivered to a broker at Birmingham, Ala., offering to sell a car of ribs at $6.60; in the telegram delivered to the broker, the price stated was $6.30; the broker accepted the offer made in the telegram as received by him and plaintiff shipped the ribs, drawing on the broker for $1650, the price of the car at $6.60. The broker refused to pay this draft, insisting that the contract price was $6.30, as stated in the telegram delivered to him and not $6.60 as stated in the telegram filed by plaintiff. Plaintiff accepted for the car of ribs $1575 and sued the telegraph company for $75, alleging said sum as his damages resulting from the negligent alteration of the telegram by the telegraph company. It was held that he could not recover this sum of defendant company, for the reason that no contract between plaintiff and the broker had resulted from the telegrams, exchanged between them, the plaintiff having made an offer to sell at $6.60 and the broker having accepted an offer at $6.30. Their minds had not met. "The minds of the party who sends a message in certain words, and of the party who receives the message in entirely different words, have never met. Neither can, therefore, be bound, the one to the other, unless the mere fact of employment of the telegraph company, as the instrument of communication, makes the latter the agent of the sender."

After a learned discussion of the principles and an exhaustive examination of the authorities, relied upon to support contrary views of the proposition, he concludes that a telegraph company is not the agent of the sender of a telegram. *Judge Hoke,* approving this conclusion, says: "There is much contrariety of decision on the question whether a telegraph company may be properly considered the agent of the sender so as to bind him by a contract made in his name or for his benefit by reason of a message which has been erroneously transmitted. In this jurisdiction it is held that the company, in such case and to that extent, is not the agent of the sender, that the latter is not bound by the terms of the erroneous message, and unless otherwise in default may not be held responsible for the effects of it." *Pegram v. Telegraph Co.,* 100 N. C., 28. This conclusion is reached upon the principle that a telegraph company is a public service agency, and that neither the sender nor the sendee when in need or desirous of its service, has any choice in the selection of the means by which the service may be procured. This Court has adopted and followed the English, rather than the American, rule as to the liability of a sender to the sendee of an erroneous telegram. *Judge Hoke* says, in *Cotton Oil Co. v. Telegraph Company, supra*: "As now advised, we have no present disposition to question the soundness of the rule." See Jones on Telegraph & Telephone Companies, 2 ed., 1916, secs. 471 and 473. This author says that the states recognizing in some form the English rule are Georgia, Massachusetts, Michigan, New Hampshire, North Carolina, Vermont and Wyoming.

Upon the facts presented in the instant case, however, it is immaterial whether the English or the American rule be applied to determine whether or not plaintiff was liable to Hubbard Brothers & Company for the cotton purchased by them upon the erroneous telegram. Plaintiff, with full knowledge that the cotton had been purchased, without regard to the condition named in his telegram, upon receipt by Hubbard Brothers & Company of the telegram, from which the words making his order conditional had been omitted, and that they had interpreted the telegram as received by them as a limited order, accepted the cotton, and took his chances of profit or loss, upon the rise or fall of the market. Defendant company cannot be liable for the loss, because of its failure to deliver the telegram as plaintiff wrote it.

In *Shingleur v. Telegraph Company,* 72 Miss., 1030, the facts were as follows: Plaintiff's cotton buyers, in Jackson, Miss., wired their brokers in Boston, directing them to sell 500 bales of cotton at eight and one-half cents per pound. In the telegram delivered to the brokers, the price was stated as eight and five-sixteenths, instead of eight and one-half. The brokers sold at the price named in the telegram as received by them and notified plaintiffs. Plaintiffs, with full knowledge of the error made in the transmission of the telegram, ratified the sale and sued the telegraph company for the difference between what they would have received had the cotton been sold at the price named in their telegram as filed, and the amount they actually received for the cotton sold at the price named in the telegram as delivered to their broker. It was held that plaintiffs could not recover. *Judge Whitfield,* writing the opinion for the Court, says: "Plaintiffs had incurred no legal liability; they had merely to refuse to comply with the terms of a contract they had never made, and remit their brokers to their adequate remedy against the company. Their payment was voluntary and gratuitous, and cannot, on any sound or just principle, create for them a cause of action where none existed prior to such voluntary payment." See, also, *Harper v. Tel. Co.,* (S. C.), 130 S. E., 119.

We therefore conclude, upon the authority of *Cotton Oil Company v. Telegraph Co., supra,* that plaintiff cannot recover of defendant the amount lost by him, as the result of the decline in the price of cotton between his ratification of the purchase made for him by his brokers, and the sale made by them, acting under authority from him. Having reached this conclusion, it becomes unnecessary to consider or pass upon the other assignments of error. The assignments of error, based upon the refusal of the Court to allow the motion for judgment as of nonsuit under C. S., 567, must be sustained. There is no evidence from which the jury could find that plaintiff was injured by the negligence of defendant, as alleged. The judgment must be

Reversed.

STATE v. MELVIN TUCKER AND TOM TAYLOR.

(Filed 16 December, 1925.)

1. **Criminal Law — Appearance of Defendant — Witnesses — Evidence— Appeal and Error—Objections and Exceptions—Courts.**

Upon the trial of a criminal action for the violation of our prohibition law, it is reversible error, over the defendant's objection aptly made, for the trial judge to permit without correction, the prosecuting attorney to argue to the jury that the defendant, who had not taken the stand, looked like a professional bootlegger, and his looks were sufficient to convict him of the offense charged.

2. **Criminal Law—Presumption of Innocence—Witnesses—Statutes.**

The legal presumption in favor of the defendant in a criminal action, goes with him throughout the trial, and under our statute, his failure to take the witness stand in his own behalf shall not prejudice him. C. S., 1799.

3. **Courts—Argument to Jury—Grossly Abusive Language.**

Where the language of an attorney in his address to the jury is unwarranted and grossly abusive, it is reversible error for the trial judge to fail to correct the attorney using the language, upon objection and exception by the opposing party. The duty of the trial judge in such instances pointed out by STACY, C. J.

APPEAL by defendant, Melvin Tucker, from *Shaw, J.*, at May Term, 1925, of IREDELL.

Criminal prosecution tried upon an indictment charging the appealing defendant and another with violations of the prohibition laws.

The State offered evidence tending to support the charges; the defendants, while offering evidence, did not go upon the stand as witnesses in their own behalf.

The record discloses the following exception: Mr. J. G. Lewis, who assisted the solicitor in the prosecution of the case, made the concluding argument to the jury, and in the course of his remarks, among other things, said: "Gentlemen of the jury, look at the defendants, they look like professed (professional) bootleggers, their looks are enough to convict them." Counsel for defendants immediately objected, but the court held the argument to be proper and overruled the objection.

From an adverse verdict and judgment pronounced thereon, the defendant, Melvin Tucker, appeals.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

Chas. W. Stevens for defendant, Melvin Tucker.

STACY, C. J. The one serious question presented by the record is whether it is prejudicial error in a case of this kind, for the solicitor

or counsel for the private prosecution in the closing argument to the jury, to comment upon the looks and appearance of the defendants who have not gone upon the witness stand, to the effect, "Gentlemen of the jury, look at the defendants, they look like professed (professional) bootleggers, their looks are enough to convict them," and on objection, to have such comments held by the court to be proper. Similar remarks were said to be prejudicial, and were either held for error or disapproved, in *S. v. Murdock,* 183 N. C., 779; *S. v. Saleeby, ibid.,* 740; *S. v. Davenport,* 156 N. C., p. 610; *S. v. Tyson,* 133 N. C., p. 699; *Jenkins v. Ore Co.,* 65 N. C., 563; *S. v. Williams, ibid.,* 505; *Coble v. Coble,* 79 N. C., 589 (the "upas-tree" case).

Had the defendants gone upon the witness stand, their demeanor, while testifying, would have been a proper subject for comment, the same as that of other witnesses, but of this, counsel was not speaking. It was the right of the State to have the defendants present at the trial, both for the purpose of identification and to receive punishment if found guilty. *S. v. Johnson,* 67 N. C., 55. And if a defendant should persist, for example, in wearing a mask while on trial, the court would be fully justified in ordering the mask removed, so that he might be identified by the witnesses. *Warlick v. White,* 76 N. C., 179. But by express statute, a defendant on trial in this jurisdiction, charged with a criminal offense, is, at his own request, but not otherwise, competent to testify in his own behalf, "and his failure to make such request shall not create any presumption against him." C. S., 1799.

In the decisions dealing directly with this statute, it has been held that counsel for the prosecution is precluded from referring in his argument to any failure on the part of a defendant to testify, or to become a witness in his own behalf. *S. v. Harrison,* 145 N. C., 414. The presumption of innocence which surrounds a defendant upon his plea of "not guilty," and which goes with him throughout the trial, is not overcome by his failure to testify in the case. He is not required to show his innocence, but the burden is on the State to establish his guilt beyond a reasonable doubt. *S. v. Singleton,* 183 N. C., 738. And while his absence from the witness stand or his failure to testify, may be a circumstance not without its moral effect upon the jury, of which every lawyer representing a defendant is always conscious (*S. v. Bynum,* 175 N. C., p. 783), yet this fact, as a matter of law, creates no presumption against him, and it is not a proper subject for comment by counsel in arguing the case before the jury. *S. v. Humphrey,* 186 N. C., 532; *S. v. Traylor,* 121 N. C., 674.

In passing, we observe, however, that this statute does not restrict the prosecuting attorney from making such comments upon the evidence and drawing such deductions therefrom as would have been legitimate

before the passage of the act, for, while enlarging the rights of the defendants, the statute did not abridge the privileges of the prosecution. *S. v. Weddington,* 103 N. C., 364. We would not be understood as saying anything which might have a tendency, even in the slightest degree, to suppress the highest enthusiasm of forensic effort on behalf of the State in a criminal prosecution, or in any case at the bar, but counsel should always remember that the ends of justice are best subserved by fair, open and legitimate debate. To arrive at the exact truth, according to the facts and the law of a case, is the aim of every legal contest, and to this end the utmost power of logical reasoning may be employed. Indeed, to master the facts and to marshal them in such a way as to lay bare the truth of a matter are marks of the accomplished advocate.

We can readily understand how the observations of counsel, here complained of, were made by the private prosecutor in the heat of debate, and disregarded by the learned judge while busily engaged in the trial of the cause, but, sitting here in calm review, we are unable to overlook the remarks in the face of an exception taken at the time, or to give them the sanction of our approval. Such denunciatory comments when seriously made, are universally disapproved. Not only do we find a uniform disapproval of such remarks in our own reports, but to like effect are the expressions in other jurisdictions: *S. v. Davis,* 190 S. W. (Mo.), 297; *January v. State,* 181 Pac. (Okla.), 514; *Thurman v. State,* 211 S. W. (Tex.), 785; *Atkinson v. State,* 273 S. W. (Tex.), 595, and many others too numerous to be cited.

In *Bessette v. State,* 101 Ind., 85, it was held for prejudicial error to permit the prosecuting attorney, over objection, to comment on the personal appearance of the defendant, not as a witness, nor on account of his manner and bearing as such, but as indicating a probability of guilt—the language used being as follows: "Luke Bessette has a bad looking face; I ask you to just look at his face; you have a right to look at his face, and I have the right to ask you to look at his face, and as prosecuting attorney I have a right to comment upon it; if his face does not show him to be a bad man, then I am not a good judge of the human countenance."

Speaking to the objection made by defendant's counsel to these remarks, and of which no notice was taken by the presiding judge, the appellate court said: "The remarks indulged in by the prosecuting attorney, having reference to the personal appearance of the accused, not as a witness, nor on account of his manner and bearing as such, but relating to his personal appearance as an accused person before the bar of the court, cannot be justified. . . . It is the duty of the *nisi prius* court to control and direct the argument of counsel in the

interest of justice, and when the prosecutor unconsciously, or, perhaps, from want of experience, went so far outside of the circle of fair debate as to attempt to degrade and humiliate the defendant, by arraigning him for his personal appearance and characteristics while he was by the compulsion of the court at its bar, it was the duty of the court to interfere for his protection."

Commenting on the sharp language used by counsel in *McLamb v. R. R.*, 122 N. C., 862, it was said by this Court: "Much allowance must be made for the zeal of counsel in a hotly contested case, especially where the colloquy is mutual; and indeed much latitude is necessarily given in the argument of a case where there is conflicting evidence; but counsel should be careful not to abuse their high prerogative, and where the remarks are improper in themselves, or are not warranted by the evidence and are calculated to mislead or prejudice the jury, it is the duty of the court to interfere." The same expression was made in *Perry v. R. R.*, 128 N. C., 471, where a new trial was awarded for improper remarks of counsel.

The rule applicable is forcibly stated by *Bynum, J.*, in *Coble v. Coble*, 79 N. C., 590, as follows: "Some allowance should be made for the zeal of counsel and the heat of debate, but here, the language and meaning of counsel were to humiliate and degrade the defendant in the eyes of the jury and bystanders—a defendant who had not been impeached by witnesses, by his answer to the complaint, or by his conduct of the defense, as it appears of record. Such an assault is no part of the privilege of counsel and was well calculated to influence the verdict of the jury. The defendant's counsel interposed his objection in apt time and upon the instant, but they met with no response from the court, and for this error there must be a *venire de novo*."

Speaking to the subject in *S. v. Tyson*, 133 N. C., p. 698, *Walker, J.*, said: "We conclude, therefore, that the conduct of a trial in the court below, including the argument of counsel, must be left largely to the control and direction of the presiding judge, who, to be sure, should be careful to see that nothing is said or done which would be calculated unduly to prejudice any party in the prosecution or defense of his case, and when counsel grossly abuse their privilege at any time in the course of the trial the presiding judge should interfere at once, when objection is made at the time, and correct the abuse. If no objection is made, while it is still proper for the judge to interfere in order to preserve the due and orderly administration of justice and to prevent prejudice and to secure a fair and impartial trial of the facts, it is not his duty to do so in the sense that his failure to act at the time or to caution the jury in his charge will entitle the party who alleges that he has been injured to a new trial. Before that result can follow the judge's inaction, objection must be entered at least before verdict."

In explanation of the language just quoted, it was said in *S. v. Davenport,* 156 N. C., p. 612: "In the passage taken from *S. v. Tyson,* we did not intend to decide that a failure of the judge to act immediately would be ground for a reversal, unless the abuse of privilege is so great as to call for immediate action, but merely that it must be left to the sound discretion of the court as to when is the proper time to interfere; but he must correct the abuse at some time, if requested to do so; and it is better that he do so even without a request, for he is not a mere moderator, the chairman of a meeting, but the judge appointed by the law to so control the trial and direct the course of justice that no harm can come to either party, save in the judgment of the law, founded upon the facts, and not in the least upon passion or prejudice. Counsel should be properly curbed, if necessary, to accomplish this result, the end and purpose of all law being to do justice. Every defendant 'should be made to feel that the prosecuting officer is not his enemy,' but that he is being treated fairly and justly. *S. v. Smith,* 125 N. C., 618."

In *Jenkins v. Ore Co.,* 65 N. C., 563, the law of this jurisdiction is stated as follows: "Zealous advocates are apt to run into improprieties, and it must generally be left to the discretion of the judge whether it best comports with 'decency and order' to correct the error at the time, by stopping or reproving the counsel, or wait until he can set the matter right in his charge. It must often happen that the judge cannot anticipate that the counsel is going to say anything improper; and it may be said before the judge can prevent it, as in this case. . . . And then the question was whether he was obliged to stop the counsel then and there, and reprove him, and tell the jury that they must not consider that, or whether he would wait and correct that and all other errors when he came to charge the jury. Ordinarily this must be left to the discretion of the judge. But still it may be laid down as law, and not merely discretionary, that where the counsel *grossly* abuses his privilege to the manifest prejudice of the opposite party, it is the *duty* of the judge to stop him then and there. And if he fails to do so, and the impropriety is gross, it is good ground for a new trial."

In *S. v. Underwood,* 77 N. C., 502, the solicitor commented on the personal appearance of the defendant, in reply to remarks of defendant's counsel calling attention to his appearance, but no objection was interposed promptly, and the matter was not called to the attention of the court at the time. For this reason and because it seemed to be only a case of "cross-firing with small shot," the matter was dismissed on the principle of *de minimis non curat lex.*

In *S. v. Hardy,* 189 N. C., p. 803, and *S. v. Lee,* 166 N. C., 250, it was said by this Court to be error for the presiding judge to instruct

the jury not to regard certain legitimate arguments of counsel. And if it be error to deny counsel the right to argue the whole case to the jury, "as well of law as of fact" (C. S., 203), and it is, then, by analogy, we think it must be held erroneous for the judge to approve the argument of counsel which violates defendants' legal rights. Here counsel stated to the jury that the defendants "look like professed (professional) bootleggers, their looks are enough to convict them," and this was held to be within the domain of legitimate observation under the circumstances of the present case. We find no evidence on the record as to how the defendants looked, and they were not before the court as witnesses. The jurors might well have understood from this statement of counsel, held to be proper by the judge, that they would be justified in convicting the defendants on their looks as defendants present in the court room, and who had not gone upon the witness stand. We must disapprove the holding as a sound legal proposition.

The cases cited by the State are not at variance with this position. *S. v. Woodruff*, 67 N. C., 89, was a bastardy case involving the paternity of a child. The child was in its mother's arms, during her examination as a witness, and its features were called to the attention of the jury. The solicitor, without objection at the time, commented upon the child's resemblance to the defendant, and the judge told the jury that they might consider this in arriving at their verdict. The practice was approved because the resemblance of the child to the defendant, its putative father, was a matter which the jury could determine from observation as well as witnesses. To like effect are the decisions in *Warlick v. White*, 76 N. C., 179; *S. v. Britt*, 78 N. C., 439; *S. v. Horton*, 100 N. C., 443; *S. v. Warren*, 124 N. C., 807.

Speaking to the subject in *Warlick v. White, supra, Rodman, J.*, said: "On general principles it would seem that when the question is whether a certain object is black or white, the best evidence of the color would be the exhibition of the object to the jury. The eyes of the members of the jury must be presumed to be as good as those of medical men. Why should a jury be confined to hearing what other men think they have seen and not be allowed to see for themselves?"

In these cases, however, it will be observed that there was before the jury some natural evidence or standard of comparison by which they could determine for themselves as to the truth of the observations. But we know of no standard, or earmarks, by which defendants may safely be convicted of violating the prohibition laws on their looks. It was conceded on the argument that "all bootleggers do not look alike."

The error in the case at bar consists in the fact that the court did not forbid the improper argument of counsel and caution the jury against its harmful influence, as suggested in many of the cases, but

he expressly permitted it to stand after objection and held it to be proper. To uphold this ruling would mean, not only to sanction the vituperative language used in the present case, but also to open the door for advocates generally to engage in vilification and abuse—a practice which may be all too frequent, but which the law rightfully holds in reproach. If verdicts cannot be carried without appealing to prejudice or resorting to unwarranted denunciation, they ought not to be carried at all. We think the course pursued in the instant case was detrimental to the defendants. Almost the identical language here used was strongly disapproved in *S. v. Murdock, supra,* but there the judge corrected any wrong impression by telling the jury that they could not consider "the physical appearance of the defendant in court, nor any personal peculiarities of his, observed by them, but that they were to pass on the case purely upon the evidence of the witnesses." And in *S. v. Evans,* 183 N. C., 758, a new trial was awarded because the solicitor persisted in calling attention to matters not in evidence after the judge had ruled that such comments were improper.

The penalty for engaging in such remarks, when not properly and fully corrected by the court and all prejudice removed, is a new trial, as was the course pursued for similar impropriety in *Starr v. Oil Co.,* 165 N. C., 587, where it was said: "Courts should be very careful to safeguard the rights of litigants and to be as nearly sure as possible that each party shall stand before the jury on equal terms with his adversary, and not be hampered in the prosecution or defense of his cause, by extraneous considerations, which militate against a fair hearing."

In *Hopkins v. Hopkins,* 132 N. C., 25, a new trial was granted because counsel overstepped the limits of propriety, and was permitted to do so by the court over appellant's objection. See, also, *Moseley v. Johnson,* 144 N. C., 257, and *Overcash v. Kitchie,* 89 N. C., 384.

Where counsel oversteps the bounds of legitimate argument, or abuses the privilege of fair debate, and objection is interposed at the time, it must be left, as a general rule, to the sound discretion of the presiding judge as to when he will interfere and correct the abuse, but he must correct it at some time during the trial, and if the impropriety be *gross* it is the duty of the judge to interfere at once. *Jenkins v. Ore Co., supra.*

It is finally contended on behalf of the State that this exception should not be held for error, because unless the observations of counsel were well founded, of which the jury alone could determine, in all probability they were more hurtful to the State than to the defendants. The suggestion carries with it a fine tribute to the good judgment and common sense of the average jury. And we may pause to say that no better system has been devised for the settlement of disputes than a trial by jury.

This right is vouchsafed and preserved to us in the fundamental law of the land. Now and then glaring errors may occur; but, generally speaking, it is seldom that twelve unbiased minds, guided by correct legal instructions, will agree upon an unrighteous conclusion. But the argument of the State proves too much. It is like a "vaulting ambition which o'erleaps itself and falls on t'other side." The law must speak before the jury. And can it afford to be less sensitive to the rights of litigants than the sentiment to which this appeal is addressed? We think not. If the natural impulse of just men is disposed to condemn unfair debate, the law will not place itself in conflict with that impulse. Indeed, in its deeper and richer meaning, the law is but the constant unfolding of a juster and truer conception of righteousness.

Frequently, in the exercise of the authority conferred upon this Court, we disregard technical errors, when it is apparent that they do not go to the merits of the case, but here we think the error complained of is too serious to be put aside as merely technical. We certainly would not hold that the defendants could be convicted simply upon their looks, but to approve as proper the argument that "their looks are enough to convict them," would necessarily involve, in its last analysis, such a holding. The appealing defendant is entitled to a new trial, and it is so ordered.

New trial.

E. J. ELLER AND WIFE, JUANITA ELLER, v. CITY OF GREENSBORO.

(Filed 16 December, 1925.)

1. Municipal Corporations — Cities and Towns — Surface Water—Negligence—Streets and Sidewalks—Damages.

The right of a city to grade and pave its streets passes to the municipality in its original creation, and an action for damages against it from a wrongful diversion of the flow of surface water rests upon the question as to whether the municipality was thereby negligent in causing an excessive flow of surface water upon the lands of an adjoining owner, the plaintiff in the action, causing substantial injury.

2. Same—Artificial Drains.

The pipes and drains placed by a city to carry off the extra flow of surface water caused by street improvements, are construed to be "artificial drains."

3. Same—Pleadings—Trials—Appeal and Error.

Where on the trial in the Superior Court the case against a municipality for damages for the wrongful diversion of surface water upon the lands of an adjoining owner, has been determined, without objection, upon the theory of permanent damages, and the inferences from the complaint are sufficient, the verdict in plaintiff's favor will not be disturbed for the failure of specific allegation of the complaint to that effect.

4. Same—Measure of Damages—Trespass.

The measure of damages, in trespass, when recoverable in an action against a city for negligently diverting a greater volume of surface water upon the lands of an owner adjoining a street improved, is the difference in value of the land before and after the wrongful diversion of the surface water by the municipality.

5. Municipal Corporations — Cities and Towns — Surface Water—Negligence—Damages—Constitutional Law.

The principle upon which a city is answerable in damages to an adjoining owner of lands whose property has been negligently injured by the increased flow of surface water caused by street improvements, rests upon the doctrine of the taking of private property for a public use upon payment of compensation.

APPEAL from *Schenck, J.*, August Term, 1925, GUILFORD Superior Court. No error.

E. J. Eller was the owner in fee of a house and lot in the city of Greensboro, on North Edgeworth Street, which he occupied as a residence. He alleges "That there is a natural drain or ditch from Edgeworth Street, through said lot, in which the surface water naturally flows, and at the time of the purchase of said lot in September, 1922, there had been provided sufficient pipes to convey away the water then flowing through said lot, without injury thereto. That after that date the defendant has carelessly and negligently and without providing sufficient outlet therefor, and in disregard of the duty it owed the said plaintiffs in that behalf, collected in much greater than the natural quantity, surface water from various parts of the city of Greensboro, and has diverted the natural flow of said surface water, and drainage and has concentrated the said increased flow of water and drainage, in such manner as to discharge the same into said natural drain through said lot, without providing sufficient outlets for the same. That by reason of the said wrongful and negligent acts of defendant, the said lot has been flooded and the soil washed away, the cellar of the house of plaintiffs has been flooded and the wall undermined and said property has been thus and otherwise injured and damaged," etc.

In answer, the city of Greensboro admits "That there is or was a natural drain or ditch from Edgeworth Street through the lot referred to in the complaint, in which the surface water naturally flows, but it is denied that in September, 1922, after said ditch had been filled up by the owner of the said lot, sufficient pipes had been provided by the owner of the lot to carry away the water which drained onto the lot as the result of the natural formation of the land adjacent to said lot."

For further answer, defendant says, in part: "That the lot mentioned in the complaint is situated at the bottom of a natural water shed

extending from the top of the hill in Green Hill Cemetery on the north to the top of the hill between Humphrey Street and West Gaston Street on the south, and from a point between Edgeworth Street and Green Street on the east, westwardly to Buffalo Creek; that all the water that falls on the eastern end of this water shed naturally drains, and has always drained, into and through the lot mentioned in the complaint; that, prior to the paving of Edgeworth Street by the city of Greensboro, such water as fell on the eastern end of this natural water shed and drained into the said lot, was conveyed from Edgeworth Street by a ditch several feet wide and some four or five feet deep, leading across the said lot and other lots to the west thereof, and that said ditch emptied into a branch, which in turn emptied into Buffalo Creek; that said ditch was amply adequate to take care of and did take care of all the surface water that drained onto the said lot."

The defendant further alleges that "it laid pipes more than adequate to take care of any additional volume of water that might be, or has been discharged onto the said lot as the result of the paving of streets adjacent to Edgeworth Street, or as the result of any other act done or caused by the defendant; that the injuries alleged by plaintiffs in their complaint were directly and proximately and solely caused by their negligence in filling up the aforesaid ditch without providing a culvert or pipes sufficient in number and size to carry away the water naturally discharged on said lot, and by permitting one of the two pipes provided to become and remain stopped up; and defendant pleads such negligence on the part of plaintiffs as a complete bar to their recovery."

The issues submitted to the jury and the answers thereto were as follows:

"1. Has the plaintiffs' property been injured by the negligence of the defendant, city of Greensboro, as alleged in the complaint? Answer: Yes.

"2. What damage, if any, are the plaintiffs entitled to recover of the defendant? Answer: $1,300."

Judgment was rendered on the verdict. Defendant made numerous exceptions and assignments of error. These, with necessary facts, will be considered in the opinion.

R. C. Strudwick and A. C. Davis for plaintiff.
Fentress & Moseley for defendant.

CLARKSON, J. We think only two main questions are involved in this case:

(1) The plaintiff contends that the duty defendant owed them—home-owners in the city of Greensboro—was not to carelessly and negligently

grade and pave its streets so as to collect and concentrate surface water greater than the natural quantity that flowed through their lot and discharge this increased and unnatural flow on their lot in such manner, mass and volume as to cause substantial injury to the same, without providing sufficient outlet. Defendant contends that it did not breach this duty.

(2) If defendant breached this duty, what is plaintiffs' measure of damage?

In *Townsans v. Hendersonville,* 175 N. C., p. 577, it was held: "The right to change the grade of the streets and improve the same, according to modern and generally approved methods, passed to the municipality in the original dedication and may be exercised by the authorities as the good of the public may require. It is held in this jurisdiction, however, that the right referred to is not absolute, but is on condition that the same is exercised with proper skill and caution, and if, in a given case, or as it may affect the property of some abutting owner, there is a breach of duty in this respect, causing damage, the municipality may be held responsible. . . . (p. 578). It is very generally held here and elsewhere that while municipal authorities may pave and grade their streets and are not ordinarily liable for an increase of surface water naturally falling on the lands of a private owner, where the work is properly done, they are not allowed, from this or other cause, to concentrate and gather such waters into artificial drains and throw them on the lands of an individual owner in such manner and volume as to cause substantial injury to the same and without making adequate provision for its proper outflow, unless compensation is made, and for breach of duty in this respect an action will lie."

The defendant prayed the court below to give six special instructions. These instructions were all given, but modified by the court below. We only give the first instructions—necessary for the decision of this case: "If the jury shall find that the surface water from a certain section of the city of Greensboro naturally drained through the plaintiffs' lot, and if the jury shall find that the city of Greensboro in grading and paving its streets did not increase the area that naturally drained through plaintiffs' lot, but that such paving of the streets within this drainage area, by making the streets impervious to water and consequently preventing a portion of the water from soaking into the ground, did in this way increase the amount of water that drained through plaintiffs' lot, and that plaintiffs' lot was damaged by reason of such increase, then the court charges the jury that the city of Greensboro would not be liable for such damage unless such grading and paving were done in a careless and negligent manner, and the jury should

answer the first issue 'No.'" Modified by the court, as follows: "Provided, however, gentlemen of the jury, in this connection the court calls your attention to the fact that while the defendant, the city of Greensboro, as a municipal corporation, may pave and grade its streets, and is not ordinarily liable for increase of surface water naturally falling on the lands of the plaintiffs where the work was properly done, if the plaintiffs have satisfied you by the greater weight of the evidence, that the defendant, city of Greensboro, in grading and paving its streets, diverted or concentrated and gathered surface water into artificial drains and threw it upon the lands of the individual owners in such manner and such volume as to cause substantial injury to said lands, and that the city of Greensboro failed to make adequate provision for its outflow, and that these facts were the proximate cause of the injury to the plaintiffs' lands, it would be your duty to answer the first issue 'Yes.'"

"The defendant admits that there is evidence that when the natural watercourse overflowed, the excess water did, of course, run over part of plaintiffs' property. But the path followed by the overflow of water is not an artificial drain; for an artificial drain is a trench or ditch purposely dug or constructed for the specific purpose of conducting water along a certain route while the path followed by an overflow of water is simply the route which it naturally finds and follows when for some reason it is forced out of its original channel."

The pipes which the defendant placed under the street and the gutters and catch basins on Edgeworth Street, we construe to be artificial drains. The water flowed along, over and through these drains, the overflow discharging upon plaintiffs' property, so it would seem that they meet all the requirements of artificial drains. They were built by the defendant and were not "natural" drains. We cannot give to the word "artificial" the narrow construction as contended for by defendant.

In 13 R. C. L., 99, it is said: "Generally, when constructing, grading, or otherwise improving a street or highway, a municipal or *quasi*-municipal corporation is not obliged to protect the adjoining property by the construction of sewers and drains, or otherwise, from the natural flow of surface water therefrom . . . (sec. 102). The municipality or *quasi*-municipality must exercise reasonable care in the construction of sewers or other sufficient means of carrying off surface waters collected in drains or artificial watercourses, and is liable for injuries to adjoining lands resulting from its negligent failure to do so." *Arndt v. Cullman*, 132 Ala., 540; *Valparaiso v. Spaeth*, 166 Ind., 14; *Farmville v. Wells*, 127 Va., 528.

In McQuillan Municipal Corporations, vol. 6, it is said:

"2710. If a municipality is *negligent* in the construction or improvement of its streets, thereby causing injury from surface waters, the municipality is undoubtedly liable. As to just when a public improvement, such as grading a street, is negligently done, no rule can be laid down, although in some states the courts seem inclined to evade the rule of nonliability by ascribing the injury to negligence whenever there is a shadow of a reason for declaring the municipality negligent."

The city, having the power to grade, gutter and pave its streets, the actionable negligence extends where there has been substantial injury. The city can only be liable for negligence in not exercising skill and caution in the construction of its artificial drains and watercourses. It is bound to exercise ordinary care and prudence. If they are so constructed as to collect and concentrate surface water that such an unnatural flow in manner, volume and mass is turned and diverted onto the lower lot, so as to cause substantial injury, the city is liable. The decisions are in contrariety in other states, but we think this consonant with reason and justice and the accepted rule in this jurisdiction. The charge of the court below was within the rule of the decision in the *Yowmans case, supra. Hines v. Rocky Mount,* 162 N. C., 409; *Donnell v. Greensboro,* 164 N. C., 330; *Pennington v. Tarboro,* 184 N. C., p. 71. The municipality having certain ministerial or corporate duties, its liability is founded on negligence. *Mabe v. Winston-Salem, ante,* 486.

The defendant contends that the complaint does not allege that it collected surface water into artificial drains. This is true, but the inference, from the language of the complaint, shows this.

In determining similar rights against individuals or public-service corporations, the accepted rule is different—it is held that more water than would naturally flow cannot be diverted and put on the land of another causing damage. *Yowmans case, supra,* p. 577.

In *Brown v. R. R.,* 165 N. C., p. 396, the Court said that "the higher owner cannot artificially increase the natural quantity of water or change its natural manner of flow by collecting it in a ditch and discharging it upon the servient land at a different place or in a different manner from its natural discharge." *Barcliff v. R. R.,* 168 N. C., p. 270. Nor can sewerage. *Finger v. Spinning Co., ante,* 74.

The second proposition is the measure of damage. Plaintiff described the effect and result of the accumulated or diverted water on his lot, as follows: "It ponded the water up, backed up there into a pond. It washed my lot away. It flowed right across it, washed a big ditch down through it. The flow of water came across my lot, flowed across the street down through my lot and washed a ditch in there several times.

The ditch was about four or five feet deep, I guess, and that wide at the bottom—six or seven feet at the bottom and across the top. There was no ditch there before the city did this paving that I know of, only the natural drain where the pipes were through. The land was level there before. It backed up all the water, and the water flowed through under my house and undermined the foundation, let that down, and caused the plaster in the rooms of the house to crack by the foundation giving away. The foundation gave way on the back of the house, and the house gave down in the walls and cracked the ceiling and the plaster in several of the rooms. It was a brick underpinned house. The cellar was flooded with water. It looked like a fish pond. If a good rain came the overflow water stayed in there for a week. That situation was caused by mighty near an average rain."

We think as to damage, the principle applicable and the reason therefor is set forth in *Hines v. Rocky Mount, supra,* p. 412: "This general principle is subject to the limitation that neither a municipal corporation nor other governmental agency is allowed to establish and maintain a nuisance, causing appreciable damage to the property of a private owner, without being liable for it. To the extent of the damage done to such property, it is regarded and dealt with as a taking or appropriation of the property, and it is well understood that such an interference with the rights of ownership may not be made or authorized except on compensation first made pursuant to the law of the land. . . . In affording redress for wrongs of this character, injuries caused by a nuisance wrongfully created in the exercise of governmental functions, our decisions hold as the correct deduction from the above principle that the damages are confined to the diminished value of the property affected."

In trespass cases, as at bar, the measure of damages is the same. *Ridley v. R. R.,* 118 N. C., 996; *Parker v. R. R.,* 119 N. C., 677; *Caveness v. R. R.,* 172 N. C., 305; *R. R. v. Nichols,* 187 N. C., 153; Southerland on Damages, vol. 4 (4 ed.), sec. 1065.

The complaint did not ask for permanent damages, nor did defendant in its answer ask that permanent damages be assessed. *Mitchell v. Ahoskie, ante,* 235. The evidence showed that the damage was permanent and the case was tried out on the theory of permanent damage. *Coble v. Barringer,* 171 N. C., 445; *Cook v. Sink, ante,* 621. We do not think there was prejudicial or reversible error.

From the whole record, we find

No error.

MELZIE WATTS, WILEY V. DAVIS, MOSIE REEL, BY HER NEXT FRIEND, J. N. REEL, AND CHAS. E. TURNER v. LEWIS LEFLER AND A. F. LEFLER.

(Filed 16 December, 1925.)

1. Evidence—Nonsuit.

Upon a motion as of nonsuit, the evidence is construed in the light most favorable to the plaintiff; and, *Held* sufficient, in this case, to hold the father, the owner of an automobile, liable for the negligence of his son in driving the car with the implied authority of the father proximately causing a personal injury to another.

2. Automobile—Family Car—Parent and Child—Principal and Agent—Negligence.

Where the father of a family keeps a car for the use of his family, and permits his children to drive it, he is responsible in damages for a personal injury proximately caused to another by the negligence of his son while driving it for his own purposes, when he has theretofore customarily permitted his son, an adult living with him, to thus use the car.

APPEAL by plaintiffs from *Lane, J.*, and a jury, August Term, 1925, CABARRUS Superior Court. Reversed.

The plaintiffs each bring a separate action, four in all, to recover damages from the defendants on account of injuries and damages sustained by them. The suits were brought by reason of the alleged negligence of the defendants, Lewis Lefler and his father, A. F. Lefler. It is contended that Lewis Lefler was driving an automobile, alleged to be his father's car, for "family purpose," in a careless, reckless and negligent manner, on the public highway and running into the motor truck upon which plaintiffs were riding on the said highway. The defendants plead contributory negligence of plaintiffs. The four cases, by consent of parties, were tried together.

Facts: Lewis Lefler, about 21 years old, a son of A. F. Lefler, was driving a Hup touring car, at about 9:00 o'clock p. m., on 3 August, 1923, on the highway between Concord and Mount Pleasant, about 2 miles from Concord, when the collision took place. W. P. Mabery testified that he was sheriff of Cabarrus County at the time, he went out to where the collision occurred and went after defendant, Lewis Lefler. That he went to his father's home. That he knocked and Mr. A. F. Lefler answered, that he asked if Lewis was at home, he called and Lewis answered and Mr. Lefler recognized who it was. Mr. Lefler said: "What do you want with him?" I said, "He has had a wreck down the road and there is a crowd of people hurt and I came after him." The boy never resisted. Mr. A. F. Lefler said: *"He has wrecked my*

Hup"; and he seemed to be worried quite a lot. That he brought the boy to town but his father did not come that night. That night or next morning he looked at the Hup touring car at Lefler Motor Company, and observed that the left-hand fender was bent up and the pin where you let the top back, that it rests on, had some blood and matter on it. That it was at least half past ten, perhaps 11 o'clock when he went to Lefler's home.

"Q. At the time A. F. Lefler said *'He has wrecked my Hup,'* you had not said anything about what car it was? Answer: No, sir.

"Q. You just said there was a wreck? Answer: Yes, sir, I said the boy has had a wreck on the road and hurt some people and I have got to take him to town, and he made this remark *'He has wrecked my Hup.'*"

Voit Barnhardt, testified, in part: "That he knew this Hup car and saw it often; that he had seen A. F. Lefler and different *ones of his family riding in it;* that he had seen *Lewis Lefler driving it.*"

Buford Corzine, testified, in part: "That he was working for the Lefler Motor Company, as salesman, at the time of this collision; that he had seen A. F. Lefler riding in the Hupmobile five passenger several times; had seen him riding with his sons, his wife and youngest boy, and with Lewis Lefler one time; that he saw a five-passenger Hupmobile in the shop after this collision, next morning about 11 o'clock; the back curtain and corner of the body was damaged some by the top carrier, the left-hand corner; the left rear fender was bent a little and the pin which holds on the top was bent a little, didn't examine it close."

H. C. McEachern, testified, in part: That he was a nephew by marriage of A. F. Lefler, he lived about 1½ miles by the road from A. F. Lefler's. That the day of the collision he helped thresh wheat at A. F. Lefler's with other members of his family, went there early in the morning and got through near sundown. Ate supper. Steve Lefler took him and his son home in his Hup car. That A. F. Lefler always had a Hup, he supposed it was his. He had a Hup he used for the family. After Steve took him home, Steve went on to Mr. Nezbit's. He saw defendant, Lewis Lefler, at his home between 8 and 9 o'clock.

"Q. How did he come there? Answer: He brought my daughter and his brother and some of my wife's kin-folks from Salisbury. Brought them *from Mr. Lefler's to my house in a Hup automobile.*

"Q. *Is that the Hup that is kept there by Mr. Lefler?* Answer: *Yes, sir.*"

That he had seen that particular Hupmobile at Mr. Lefler's in the yard, but couldn't say how many times. That he had seen Mr. Lefler, and other members of his family, riding in his Hupmobile with Lewis Lefler driving, going to church, etc. That Lewis Lefler was living at his

father's at the time of this collision, was single and had made his home there all his life up to this time. . . . That he did see Lewis Lefler when he left the house of witness, and he was driving this particular Hupmobile at that time. That Steve had his car and gone. . . . Lewis Lefler and witness' son went off in the Hup together.

At the close of the evidence for plaintiff, the court below granted defendant's, A. F. Lefler's, motion for judgment as of nonsuit. The usual issues submitted in such cases, negligence, contributory negligence, and damages, were found by the jury in favor of plaintiffs and against defendant, Lewis Lefler. Defendant, Lewis Lefler, made no appeal. The main controversy is over the nonsuit as to defendant, A. F. Lefler.

Exceptions and assignments of error as to granting the nonsuit and exclusion of evidence, were duly made by plaintiffs and appeal taken to the Supreme Court. The material assignment of error and the necessary evidence will be considered in the opinion.

J. L. Crowell and H. S. Williams for plaintiffs.
M. B. Sherrin and Frank Armfield for defendant A. F. Lefler.

CLARKSON, J. The plaintiffs' assignments of error, as to the exclusion of evidence, will not be considered. The questions may not arise on another trial of the case. The main question we will consider: The court below granting the motion of defendant A. F. Lefler for judgment as in case of nonsuit at the close of the plaintiffs' evidence. C. S., 567.

The accepted rule is: "On a motion to nonsuit, the evidence is to be taken in the light most favorable to plaintiff, and he is entitled to the benefit of every reasonable intendment upon the evidence and every reasonable inference to be drawn therefrom." *Barnes v. Utility Co., ante,* 385.

In *Allen v. Garibaldi,* 187 N. C., 799, it was said: "In fact, it is frankly conceded by the defendant that the decision in *Wallace v. Squires,* 186 N. C., 339, must be overruled if his motion for judgment as of nonsuit is sustained in the present case. Without deciding whether we shall follow all that was said in that case, it is sufficient for present purposes to state that the 'family purpose' doctrine, with respect to automobiles, has been adopted as the law of this jurisdiction in several recent decisions. *Robertson v. Aldridge,* 185 N. C., 292; *Tyree v. Tudor,* 183 N. C., 340 (modified in another respect in *Williams v. R. R., ante,* p. 354); *Clark v. Sweaney,* 176 N. C., 529; *S. c.,* 175 N. C., 280; *Williams v. May,* 173 N. C., 78; *Taylor v. Stewart,* 172 N. C., 203. For an extended discussion of this doctrine, see 33 Yale Law Journal, 780, and note to *Arkin v. Page,* 287 Ill., 420, as reported in 5 A. L. R., 216."

"When a car owner gives it over to the use of his family, and permits it to be operated by the dependent members thereof, the individuals to whom it is so entrusted may properly be considered his agents in such a sense that their negligence in the use of the car is imputable to him even though the driver of the car is the adult son of the owner, who is a member of his family. In courts where the 'family purpose' rule prevails it does not seem to make any difference whether the particular trip was entirely authorized or not as where a father permitted a son to use his car and knew the son was going to take friends to a dance in a certain town the father was liable for gross negligence of the son in driving and injuring a guest although they were driving beyond the point which was their original destination. As the father allowed the son to use the car for his pleasure and it was being used for that purpose there was no departure from that purpose." The Law Applied to Motor Vehicles—Babbitt (3 ed.), 1923, sec. 1179.

Berry on Automobiles, (4 ed.), 1924, sec. 1280, says: "The rule is followed in some of the states in which the question has been decided, that one who keeps an automobile for the pleasure and convenience of himself and his family, is liable for injuries caused by the negligent operation of the machine while it is being used for the pleasure or convenience of a member of his family." Numerous cases are cited, and among them *Wallace v. Squires, supra.*

Berry, *supra,* sec. 1302, says, in part: "It makes no substantial difference as regards the liability of a parent for the acts of his child while the latter is operating an automobile kept by the parent for family use, whether the child is a minor or an adult. The question of liability does not depend upon the relation of parent and child, and the parent is under no more legal obligation to supply an automobile for the use and pleasure of a minor child than he is for the use and pleasure of an adult child. Frequently fathers continue not only to support their children after the latter have become *sui juris,* but to provide them, as members of his family, with the means of recreation and pleasure. The question is whether the child, be he an adult or a minor, was acting for the parent, was using the car for a purpose for which the parent provided it, and the evidence to support the affirmative of this issue is not different when the child is an adult than it is when the child is a minor." *Marshall v. Taylor,* 168 Mo. App., 240; *Griffin v. Russell,* 144 Ga., 275; *Hutchins v. Haffner,* 63 Col., 365; *King v. Smythe,* 140 Tenn., 217. Huddy on Automobiles (6 ed.), 1922, secs. 659-660.

There is a conflict of decisions, but we think the great weight sustains the position in the above cited authorities. The father—the owner of the automobile and the head of the family has the authority to say by whom, when and where his automobile shall be driven or he can forbid the use

altogether. With full knowledge of an instrumentality of this kind, he turns over the machine to his family for "family use." When he does this, under the "family doctrine," which applies in this State, he is held responsible for the negligent operation of the machine he has intrusted to the members of his family.

The evidence, taken in the light most favorable to plaintiff, showed that the Hupmobile, driven at the time of the collision, belonged to A. F. Lefler. He told the sheriff "He has wrecked my Hup." Lewis Lefler lived with his father at the time of the collision. When the sheriff went to arrest him, a few hours after the collision, he was at his father's home and had retired. A. F. Lefler and different members of his family rode in the Hup car. Lewis Lefler was seen driving it. A. F. Lefler rode in the car with his sons, his wife and youngest boy. The day of the collision, A. F. Lefler threshed wheat. H. C. McEachern, who married his niece and who was a neighbor, living 1½ miles by the road, went with other members of his family to help him. Went early in the morning and got through near sundown. After supper one of the sons, Steve, took McEachern home in a Hup. Lewis, the defendant, was at McEachern's home between 8 and 9 o'clock. He brought McEachern's daughter and his brother and some of McEachern's wife's kin-folks from Salisbury, from A. F. Lefler's house in a Hup automobile, kept by A. F. Lefler at his house. Lewis Lefler and McEachern's son left that night together in the Hup automobile shortly before the collision occurred.

We think, under the law, as we construe it, there was some evidence, more than a scintilla, to be submitted to the jury. The credibility and probative force is for the jury.

For the reasons given, the judgment of nonsuit is

Reversed.

CRAIG-LITTLE REALTY AND INSURANCE COMPANY AND W. A. WATSON v. J. G. SPURRIER AND WIFE, WILLIE AUSTIN SPURRIER.

(Filed 16 December, 1925.)

1. Contracts—Parol Evidence—Written Contracts.

Parol evidence is inadmissible to contradict, vary or add to the terms of a written contract, and is only competent to show such parts thereof as were not contained in the writing or intended so to be, when not in contravention of the statute of frauds.

2. Same—Statute of Frauds—Principal and Agent—Lands.

Where an agency for the sale of lands is created absolute and entire in form, with agreement on the part of the owner to convey the title within a specified time, it is incompetent for the owner to prove by parol

evidence that it was on condition that others should likewise include their lands in the same locality as a whole, upon like conditions, at varying prices, the same being contradictory to the terms of the contract sued on and required by the statute of frauds to be in writing.

APPEAL by plaintiffs from *Lane, J.*, at March Term, 1925, of the Superior Court of MECKLENBURG.

The defendants executed and delivered to the Craig-Little Realty and Insurance Company the following paper:

EXCLUSIVE AGENCY CONTRACT.

We hereby authorize Craig-Little Realty and Insurance Company to act as our agent, for a period of thirty days from date, 8 December, 1923, to negotiate the sale of our property described at the price of $3,000 net to us. In the event of sale, I agree to furnish good and sufficient title.

Location, 902 E. 4th. Lot, about 48 x 113. Terms: Cash.

J. G. SPURRIER, *Owner.*

Witness: A. G. Craig. MRS. J. G. SPURRIER, *Owner.*

The plaintiffs allege that in pursuance of this agency contract they agreed with W. A. Watson to sell him the lot for cash; that Watson was ready, able and willing to comply with the terms of his agreement, and that he demanded of the defendants a title in fee. They allege also that on 5 January, 1924, they gave personal notice to the defendants of said sale and demanded a deed from them for the property; that the defendants failed to execute such deed and were notified by the plaintiffs within the thirty days specified in the contract that the sale had been made and that the execution of a deed was demanded. The plaintiffs offer to pay the sum of $3,000 to the defendants, and upon their refusal to accept pray judgment for specific performance, in accordance with the terms of the contract.

The defendants admit the execution of the agency contract, and by way of defense allege that some time early in December A. G. Craig, of the Craig-Little Realty and Insurance Company, approached the executors of the estate of Mrs. Ida L. Austin, deceased, and wanted to secure an agency contract for the sale of the real property belonging to said estate located on McDowell and Fourth streets, and the said A. G. Craig, learning that the defendants were the owners of a lot in the midst of the estate property, approached the defendants for an agency contract on their lot, also stating that he could handle the estate property to a much greater advantage by handling the defendants' property with it; that the defendants told him they would, under no circumstances, be willing to put their property in for sale with the estate property, unless

their sister, Mrs. J. W. Ray, would put her lot in also, as they would not want to sell and have to move away from the neighborhood in which their sister lived, but if their sister would consider putting her lot in, they would themselves consider the matter. They allege that the defendants and the executors of the estate of Mrs. Ida L. Austin, deceased, and Mrs. Ray, advised among themselves with reference to giving the plaintiff, Craig-Little Realty and Insurance Company, an agency contract for the sale of all the property on a basis of a total price of $29,500, divided as follows: Corner house, $12,000; lot on McDowell Street, $4,000; lot on Fourth Street, $6,000; Spurrier lot, $3,000; Ray lot, $4,500; that the defendants agreed with the said A. G. Craig that they would sign an agency contract, which they did upon the express condition and consideration that the same should be taken in connection with an agency contract signed by the executors of the estate of Mrs. Ida L. Austin, deceased, and an agency contract signed by Mr. and Mrs. J. W. Ray, and that all of the property should be sold as a whole; and that said agency contract was predicated and based on said condition and agreement; that the defendants were willing to sell their lot for less than its actual and real value, in order to effect a sale of the balance of the property adjoining, in which they had an interest, and the defendants would not have given Craig-Little Realty and Insurance Company an agency contract for the sale of their lot, to be sold separate and apart from the other property. They allege also that the plaintiffs did not get a purchaser for the estate property and did not get a purchaser for Mrs. Ray's lot, but knowing that the price placed upon the defendants' property was very small, undertook to get a purchaser for it, and are now seeking and attempting to make the defendants dispose of their lot separate and apart from the disposal of the other property, in absolute violation of the agreement between the defendants and the plaintiff, Craig-Little Realty and Insurance Company. The defendants also pleaded the statute of frauds in bar of the plaintiffs' recovery.

At the trial plaintiffs tendered the following issue:

"Is the plaintiff, W. A. Watson, entitled, as alleged in the complaint, to require the defendants to execute and deliver to the plaintiff a deed to the property described in the complaint?" This issue was declined and the plaintiffs excepted.

The court submitted the following issues and the plaintiffs excepted:

1. Were the defendants induced to sign the paper-writing attached to the complaint as Exhibit "A" by reason of the express condition and understanding that the same was to be effective as authority to sell only in the event the sale made was of the Mrs. J. W. Ray lot, the Ida L. Austin estate property, and the lot of the defendants, as alleged in defendants' further answer and defense? Answer: Yes.

2. Is the plaintiffs' cause of action barred by the statute of frauds, C. S., 988, for that no memorandum or note of contract sued on was put in writing and signed by the party to be charged therewith or by some other person by him thereto lawfully authorized? Answer: No.

3. Is the plaintiff, W. A. Watson, entitled, as alleged in the complaint, to require the defendants to execute and deliver to the plaintiff a deed to the property described in the complaint? Answer: No.

There was a judgment for the defendants and the plaintiffs appealed, assigning error.

H. L. Taylor and C. H. Gover for plaintiffs.
Stewart, McRae & Bobbitt for defendants.

ADAMS, J. This is an action to enforce the specific performance of a contract relating to land. The contract purports to have authorized the Craig-Little Realty and Insurance Company to act as the defendants' agent for a period of thirty days from 8 December, 1923, to effect a sale of their property at the net price of three thousand dollars. The defendants admit they signed the contract, but allege they did so upon the express condition that it should be taken in connection with similar contracts signed by J. W. Ray and his wife, and by the executors of Ida L. Austin, and that the several lots should be sold as a whole. They allege theirs was an agency contract predicated or based upon this express agreement. During the trial they offered evidence in support of these allegations. The plaintiffs objected, but the evidence was admitted, and the first thirteen exceptions which go to the heart of the controversy are an assault upon the competency of this evidence, the specific ground of exception being an alleged infringement of the rule which prohibits the admission of parol evidence to vary the terms of a written instrument.

In *Moffitt v. Maness,* 102 N. C., 457, it is suggested that there is too great a tendency to relax the settled rules of evidence against the admissibility of parol testimony to contradict, vary, or add to the terms of a written contract, and that there is danger of construing away a principle which has always been considered one of the greatest barriers against fraud and perjury. This is an ancient and basal principle in the law of evidence; and we have no disposition to abate its stringency or in any manner to impeach the quality or to impair the strength of the many decisions in which it has been approved and enforced by this Court. Lest by reason of its rigor and harshness it become an instrument of injustice, it is often relaxed in its application to writings which are incomplete, informal, or transitory; but on the theory that a written contract supersedes all verbal stipulations covering its terms, this elemental principle should be upheld in its integrity as an essential pro-

tection against the temptation to perjury and the commission of fraud. *Ray v. Blackwell,* 94 N. C., 10; *McAbsher v. R. R.,* 108 N. C., 344; *Cobb v. Clegg,* 137 N. C., 153, 157; *Basnight v. Jobbing Co.,* 148 N. C., 350; *Woodson v. Beck,* 151 N. C., 144; *Pierce v. Cobb,* 161 N. C., 300; *Wilson v. Scarboro,* 163 N. C., 380; *Potato Co. v. Jenette,* 172 N. C., 1; *Cherokee County v. Meroney,* 173 N. C., 653; *Farquahar Co. v. Hardware Co.,* 174 N. C., 369; *Patton v. Lumber Co.,* 179 N. C., 103; *Thomas v. Carteret County,* 182 N. C., 374; *Colt v. Turlington,* 184 N. C., 137.

The defendants admit this to be the general rule and do not seek to impair it; but they say that parol evidence was admissible to show that the contract of agency was executed and delivered on condition that it should not become effective as a contract unless the other property was included in the sale. The rule on which they rely is familiar. In *Bowser v. Tarry,* 156 N. C., 35, it is stated in the following language: "Although a written instrument purporting to be a definite contract has been signed and delivered, it may be shown that the same was not to be operative as a contract until the happening of some contingent event, and this on the idea, not that a written contract could be contradicted or varied by parol, but that until the specified event occurred the instrument did not become a binding agreement between the parties," a principle which has been sanctioned and sustained by the Court in various combinations of facts. *Kerchner v. McRae,* 80 N. C., 219; *Braswell v. Pope,* 82 N. C., 57; *Penniman v. Alexander,* 111 N. C., 427, affirmed in 115 N. C., 555; *Kelly v. Oliver,* 113 N. C., 442; *Pratt v. Chaffin,* 136 N. C., 350; *Aden v. Doub,* 146 N. C., 10; *Hughes v. Crooker,* 148 N. C., 318; *Garrison v. Machine Co.,* 159 N. C., 285; *White v. Fisheries Co.,* 183 N. C., 228; *Overall Co. v. Hollister Co.,* 186 N. C., 208.

The defendants attempted to apply this principle to the facts developed by the evidence and upon this theory the trial judge submitted the first issue. In this issue, it will be noted is incorporated a part of the defendants' further answer and defense, in which the alleged agreement is stated to be that the defendants executed the agency contract "upon the express condition and consideration that the same should be taken in connection with an agency contract signed by the executors of the estate of Mrs. Ida L. Austin, deceased, and an agency contract signed by Mr. and Mrs. J. W. Ray, and that all of the property should be sold as a whole, and that said agency contract was predicated and based on said condition and agreement." It will be noted, also, that the written contract is absolute and unconditional. The defendants do not allege that it was to become effective as a contract only in the event that the several lots were sold as a whole, but, in substance, that there was an unwritten agreement between the parties that their contract

should be taken in connection with other similar contracts. The defendants' pleading and evidence tend to establish their unconditional agreement to sell their lot at any time within thirty days from 8 December, 1923, at the price of $3,000, and then to contradict the writing by engrafting the condition that unless all the lots were sold they should not be bound. The unconditional written agreement cannot be nullified by appending an antagonistic unwritten condition. It is not a case in which, if only a part of the contract is in writing and another part in parol, the latter may be shown by oral evidence, for the dual reason that the statute of frauds applies and one part of the agreement would be in direct conflict with the other. See *Evans v. Freeman,* 142 N. C., 61; *Typewriter Co. v. Hardware Co.,* 143 N. C., 97; *Farrington v. McNeill,* 174 N. C., 420; *Henderson v. Forrest,* 184 N. C., 230. In the submission of the second issue and in the charge we think there was error.

The defendants contend, however, that the answer to the first issue precludes the plaintiffs' alleged right to specific performance upon the doctrine enunciated in *Rudisill v. Whitener,* 146 N. C., 403, and in other cases. In his instructions to the jury his Honor seems to have treated the matters involved in the first issue as determinable by the question whether at law the paper signed by the defendants became effective as a contract, and not clearly to have presented the equitable principle in *Rudisill's case* in such way as to require a decision as to its concrete application. In the absence of instructions upon the specific question it is unnecessary that we express an opinion.

It is further insisted by the defendants that their motion for nonsuit should have been granted on the ground that the basis of the plaintiffs' suit is not an option, but a contract of agency, and as no memorandum was signed by the defendants or by the Craig-Little Realty and Insurance Company during the term of the agency the plaintiffs have failed to show a compliance with the statute of frauds, and therefore cannot recover. In our opinion the paper referred to as Exhibit "A" is more than the simple creation of an agency. True, the Craig-Little Realty and Insurance Company was authorized to act as the defendants' agent; but the defendants agreed in the event of a sale at the price of $3,000 net to them to furnish a good and sufficient title to the lot. The fact that they were to receive $3,000 net would seem to indicate that the company had a pecuniary interest in the contract—the contemplated right to sell at a price in excess of $3,000. It did not acquire the lot under the contract, but a right in the event of a sale to call for the execution of a deed by the defendants upon payment of the purchase price. The sale was to be made for the benefit of the company as well as for the benefit of the defendants.

For the errors pointed out there must be a

New trial.

CITY OF ASHEVILLE v. W. P. HERBERT AND CHARLES H. COOKE.

(Filed 16 December, 1925.)

1. **Statutes — Private Local Laws — Municipal Corporations — Cities and Towns—Private Sale of Lands—In Pari Materia.**

Where a city has broad powers to sell its real estate not held for governmental purposes and uses, and later its charter has been amended so as to curtail these powers and in conformity with this omission in the private act, a public act is passed requiring previous notice of sale by advertisement in a prescribed way and the sale be public, the private and public acts are to be construed *in pari materia.*

2. **Same—Advertisement of Private Sale.**

Where the charter of a city, requiring that its lands not held for present public use, has been amended so as to curtail the broad powers theretofore given in respect to sale and a general statute requires a certain preceding advertisement before the lands may be sold, the requirements of the public statute must be complied with in order for the city to make a valid sale. C. S., 2688.

3. **Same—Repugnancy.**

The repugnancy between a private statute authorizing a city to sell its lands and a later public statute on the subject generally, must be real and not seeming, in order to work a *pro tanto* repeal, and repeal by implication will be avoided if possible, and the two statutes will be construed together so as to give effect to both unless there is contradiction or repugnancy, or absurdity or unreasonableness, and mere difference in their terms is not always sufficient.

4. **Same—Trusts.**

A statute authorizing a city to sell municipal lands does not by implication apply to such as are held in trust for its use or to streets in reference to which adjoining property owners have acquired rights, such as by dedication and resulting improvements.

APPEAL by defendants from BUNCOMBE Superior Court. *Lane, J.*

Action to compel defendants to perform specifically contract to purchase land. From a judgment in favor of plaintiff, defendants appealed. Reversed.

The agreed statement of facts shows the following:

The plaintiff and the defendants agreed that the plaintiff would sell and the defendants would purchase the Ryerson property situate in West Asheville, containing 90 acres, at the price of $50,000, at private sale, and plaintiff tendered to defendants a deed in due form purporting to convey the said lands in fee simple, according to the terms of contract to purchase. Defendants declined to accept plaintiff's deed therefor, on the following grounds:

"(a) That the city of Asheville had no authority to sell said lands and premises to the defendants, and (b) that even if the city of Ashe-

ville had authority to so sell the land to the defendants, the sale to the defendants and the said deed was void, for that the commissioners of said city had failed to comply with the provision of C. S., 2688, which provides that "The mayor and commissioners of any town shall have full power at all times to sell at public outcry, after thirty days notice, to the highest bidder, any property, real or personal, belonging to any such town, and apply the proceeds as they think best"; no notice whatever being given or published of said sale, as required by said section, the said lands and premises, not having been sold at public outcry to the highest bidder, but by private sale, pursuant to the resolution hereinbefore set forth."

The defendants have, at all times, been ready, able and willing to comply with their contract to purchase said property. Appropriate resolutions were adopted by the city of Asheville, approving the tentative agreement entered into between plaintiff's mayor and the defendants, directing that a conveyance in its name with the usual covenants of seizin and warranty free from encumbrances be tendered to the defendants, and said deed was tendered in all respects in accordance with said resolution. The court below was of opinion that the deed so tendered was valid to convey to the defendants a good indefeasible title in fee simple to the said lands, and the defendants were directed to pay the purchase price in accordance with the contract.

Jones, Williams & Jones for plaintiff.
Merrimon, Adams & Adams for defendants.
Frank Carter, amicus curiae, filed a brief.

VARSER, J. The controversy is restricted to the question whether the city of Asheville can make a valid private sale of this land. It is admitted that C. S., 2688, has not been complied with. The charter of plaintiff city is set out in Private Laws 1923, ch. 16, and in sec. 1 thereof, among its enumerated corporate powers is the power to acquire and hold "all such property, real and personal as may be devised, bequeathed or in any manner conveyed to it, and may invest, sell or dispose of same." This charter of the plaintiff is a reënactment and a consolidation of its charters of Public Laws 1883, ch. 143 and Private Laws 1883, ch. 111, and acts amendatory thereof. It appears to be a recasting of the entire group of legislative acts theretofore comprising its charter. Section 1, of chapter 111, Private Laws 1883, empowers the plaintiff to "purchase and hold for purposes of its government, welfare and improvement, all such estate, real and personal, as may be deemed necessary therefor, or as may be conveyed, devised or bequeathed to it, and the same may, from time to time, sell, dispose of and reinvest as

shall be deemed advisable by the proper authorities of the corporation." The 1923 reënactment causes the quoted excerpt to read as follows: "Acquire and hold all such property, real and personal, as may be devised, bequeathed, sold, or in any manner conveyed to it, and may invest, sell or dispose of same."

We are forced to conclude that the Legislature was mindful, not only of the terms contained in the 1923 reënactment, but was, also, mindful of the omissions from its former charter. Chapter 112, Public Laws 1872-3, now C. S., 2688, has remained intact since the time of its enactment. It provides that the mayor and commissioners of any town shall have power at all times to sell at public outcry, after 30 days notice, to the highest bidder, any property, real or personal, belonging to any such town, and apply the proceeds as they may think best. Of course, this section is held not to apply to such lands as are held in trust for the use of such town (*Southport v. Stanly,* 125 N. C., 464), or such real estate as is devoted to governmental purposes (*Turner v. Comrs.,* 127 N. C., 154; *Carstarphen v. Plymouth,* 180 N. C., 26), or to streets in reference to which adjoining property owners have acquired rights on account of the dedication thereof, and resulting improvements. *Southport v. Stanly, supra; Moose v. Carson,* 104 N. C., 431; *Church v. Dula,* 148 N. C., 262; *Moore v. Meroney,* 154 N. C., 158. The record in *Carstarphen v. Plymouth, supra,* shows that the trial court put his decision on the double basis that C. S., 2688, did not give the authority to sell land held for governmental purposes, and that it had not been complied with.

Shaver v. Salisbury, 68 N. C., 291, apparently conflicts with the later authorities. Upon a careful examination of the charter of Salisbury, it is clear that wide and unusual powers were given the commissioners, and it was expressly committed to their discretion as to the manner and method of exercising these powers.

The character of the property, that is whether it is trust property or held for governmental purposes, is not involved in this action, and that question is not considered, for we understand that it was conceded upon the argument that the "Ryerson property" is such as can be sold by the plaintiff, provided the method of sale required by law is followed. In *Newbold v. Glenn,* 67 Md., 489, 10 Atl., 242, the statute authorizing a sale of property required notice to be published in a newspaper in Baltimore city, but the mayor and council did not comply therewith, but, in good faith, and for full value, sold the property at private sale, and its conveyance was upheld. We cannot accept the reasoning in this case.

In the instant case it is a question of power, under the law. Good faith on the part of the authorities of the city of Asheville, is clearly

apparent from the entire record and an excess over cost to the extent of $20,000 is in the sale price. The legal requirements, whatever they may be, must be followed. *Murphy v. Greensboro, ante,* 268. Good faith and apparently fair price cannot dispense with the law.

It is the accepted doctrine in this jurisdiction that the powers of a municipality, accurately described in Dillon on Municipal Corporations (5 ed.), sec. 237, as follows: "It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation—not simply convenient, but indispensable." *Smith v. New Bern,* 70 N. C., 14; *S. v. Webber,* 107 N. C., 962, 965; *S. v. Eason,* 114 N. C., 787, 791; *Love v. Raleigh,* 116 N. C., 296, 307; *S. v. Higgs,* 126 N. C., 1014, 1021; *Elizabeth City v. Banks,* 150 N. C., 107; *Danville v. Shelton,* 76 Va., 325; *Blake v. Walker,* 23 S. C., 517; *Charleston v. Reed,* 27 W. Va., 681; *Barnett v. Denison,* 145 U. S., 135; *Cleveland School Furniture Co. v. Greenville,* 146 Ala., 559; *Crofut v. Danbury,* 65 Conn., 294; *Jacksonville Electric Light Co. v. Jacksonville,* 36 Fla., 229; *Foster v. Worcester,* 164 Mass., 419; *S. v. Butler,* 178 Mo., 272; *Winchester v. Redmond,* 93 Va., 711; *R. R. v. Dameron,* 95 Va., 455; *Donable v. Harrisonburg,* 104 Va., 533.

All acts beyond the scope of the powers granted to a municipality are void. *Dillon on Municipal Corporations, supra; Somerville v. Dickerman,* 127 Mass., 272; *Harvard College v. Boston,* 104 Mass., 470; *S. v. Passaic,* 41 N. J. L., 90; *Heiskell v. Baltimore,* 65 Md., 125; *Christie v. Malden,* 23 W. Va., 667. In construing the extent of the powers of municipalities, the fundamental and universal rule is, that while the construction is to be just, seeking first of all for the legislative intent in order to give it fair effect, yet any fair, reasonable or substantial doubt as to the extent of the power is to be determined in favor of the public and against the municipality. Dillon on Municipal Corporations, sec. 239. This grows out of the fact that the majority-will controls, and that minorities are bound by the acts of majorities, and that the public officers occupy a trust relation in which the inhabitants of the city are *cestuis que trustent,* and the officers are trustees. The *power of sale* in the instant case exists both under the charter and under C. S., 2688. In the light of this rule of construction, we are forced to conclude that the Legislature intended, when it reënacted plaintiff's charter in 1923, omitting therefrom the pertinent language committing the method of sale to the discretion of plaintiff's officers, to include within its terms the general law (C. S., 2688), which was an exclusive method under the doctrine expressed in the maxim, "*expressio unius est exclusio alterius.*"

and that this general statute (C. S., 2688), should be, and was, the only method by which municipalities could sell, unless special provision was made. Therefore, its proper use of the power to sell in plaintiff's charter carried with it the terms of C. S., 2688, as to the method of exercising the power of sale.

This controversy is not as to whether the power of sale exists, because the power is conceded, but it is the method of exercising the power. We are advertent to the salutary rule that a general statute shall read as silently excluding from its operation the cases which have been provided for by a special statute (*S. v. Johnson,* 170 N. C., 685; *Felmet v. Comrs.,* 186 N. C., 252), and when there is repugnancy between the general statute and the special statute, and both are complete within themselves, and it is not practical to apply the doctrine of *in pari materia,* then the general statute gives way to the special statute in order to effectuate the legislative intent as far as may be. We conclude that there is no repugnancy between the charter and C. S., 2688, and that they must be construed *in pari materia.*

When the charter of a municipality contained a proviso prohibiting it from pledging its credit for over $10,000 without a vote, a subsequent act empowered the city to build a bridge and pledge its credit therefor, was held subject to the condition and limitation of the proviso in *S. v. Election Comrs.,* 58 Cal., 561. Repugnancy between general and special acts must be real and not seeming in order to work a *pro tanto* repeal. Endlich on Interpretation of Statutes, sec. 226; *Harrisburg v. Scheck,* 104 Pa. St., 53. Repeals by implication will be avoided, if possible, and if two statutes can be read together they should be so read, to the end that both will be effective unless there is contradiction or repugnancy, or absurdity or unreasonableness. Lewis' Sutherland on Statutory Construction, sec. 267; *Regina v. Mews,* 6 Q. B. Div., 47; *Smith v. Speed,* 50 Ala., 276. Difference is not sufficient to justify the inference of repeal, there must be contradiction. *Kesler v. Smith,* 66 N. C., 154; *Landis v. Landis,* 39 N. J. L., 274; *Nixon v. Piffet,* 16 La. Ann., 379.

In view of these rules so widely recognized and applied by the courts, we are minded to conclude that both the plaintiff's charter and the general law, grant the power to sell the land in controversy, and that C. S., 2688, must be complied with by plaintiff in order to make a valid sale thereof. In *Harris v. Durham,* 185 N. C., 572, is clearly demonstrated the ease with which the contrary intent could have expressed itself in plaintiff's 1923 charter, by using the words "publicly or privately," and thereby excluding all uncertainty.

The reasons urged in the excellent brief of counsel for plaintiff against the rule herein declared, are reasons more properly addressed to the legislative branch than to the judicial. It is ours *jus dicere* and not *jus dare.* If inconvenience shall result, we feel that the public adver-

tisement and the sale at public auction makes the transfer of such property by a municipality so public and so open that every objector can have his proper remedy and all persons who assume the responsibilities of public office in municipalities must needs be beyond the domain of criticism. The contemplated sale, in the instant case, apparently could net the city a profit of $20,000 *non constat* that a public sale would not net the city a much larger profit, or, if not satisfactorily sold, the city has a right to reject any and all bids.

Let it be certified that the judgment appealed from is

Reversed.

JAMES S. KING v. L. W. DAVIS.

(Filed 16 December, 1925.)

1. Contracts—Written Contracts—Ambiguity—Interpretation—Intent.

The intention of the parties to a written contract as expressed by the entire instrument, in connection with the subject-matter, the surrounding and attendant circumstances and the object in view, control the interpretation of the contract when the language used therein is ambiguous or of doubtful import; and the words employed are given their ordinary meaning, when reasonably permissible, and if they have more than one meaning, the one will be accepted which appears to carry out the intent of the contracting parties.

2. Partnership — Dissolution — Banks and Banking — Insolvency—Dividends—Contracts.

Where upon a dissolution the partners agree to the portion each should have from the firm deposit in a bank in the hands of a receiver, and a debt due by one partner to the bank is offset against the firm's deposit, without the knowledge of the other, a dividend of the insolvent bank paid to the party who has offset his individual debt to the bank, is due and payable by him to his copartner, to the same extent and in the same amount as if no offset had been effected.

3. Offset—Counterclaim.

An offset in part of a debt due is not a payment *pro tanto*, but an allowance made to the credit of the one owing the other a larger amount, or the balancing of the accounts when both are in an equal amount.

APPEAL by plaintiff from *Dunn, J.*, April Term, 1925, NEW HANOVER Superior Court. Affirmed.

Material facts: The plaintiff and defendant were partners in the clothing and men's furnishing business, in Wilmington, N. C., plaintiff

being one-third and defendant two-thirds owner, under the firm name of L. W. Davis & Co. On 14 March, 1923, the partnership was dissolved. The agreement of dissolution was in writing, plaintiff selling out the tangible business to the defendant (except the accounts due by customers). Defendant was to pay all debts. The accounts were to be collected by either copartner and divided between plaintiff and defendant—one-third to plaintiff and two-thirds to defendant. The lease of the premises was assigned to defendant. The controversy arose over the following: "It is understood and the above agreement and sale is made upon the further condition that the funds on deposit in the Commercial National Bank at the time the same closed is the joint property of L. W. Davis and James S. King, and that all dividends and payments on account of said deposit shall be divided, when received in the proportion of ⅓ thereof to James S. King and ⅔ thereof to L. W. Davis."

The plaintiff alleges: "During the continuance of said copartnership and on 30 December, 1922, said copartnership had on deposit with the Commercial National Bank of Wilmington, the sum of $6,306.90; on said 30 December, 1922, said Commercial National Bank was closed by an order of the Comptroller of the Currency, and thereafter a receiver for said bank was appointed by said Comptroller of the Currency on or about 1 February, 1923, since which time said receiver has been in charge of and administering the affairs of said bank; under the terms of the agreement of dissolution hereinbefore mentioned the aforesaid sum of $6,306.90 so on deposit with said bank was and continued to be the joint property of plaintiff and defendant in the proportion of one-third to plaintiff and two-thirds to defendant and it was by said agreement provided that all dividends and payments on account of said deposit should be divided, when received, in the proportion of one-third thereof to plaintiff and two-thirds thereof to defendant. That at the time of the closing of the Commercial National Bank of Wilmington and the appointment of a receiver therefor, defendant was individually indebted to said bank by a certain note in the sum of $2,500; that on or about 17 April, 1924, of which fact plaintiff was not at the time informed, defendant obtained by way of offset against the deposit in said bank belonging to plaintiff and defendant the amount of defendant's individual note for $2,500 to said bank, which said amount of $2,500 was thereupon charged against said deposit of $6,306.90, leaving a balance on deposit in said bank to the credit of said copartnership of $3,806.90; Thereafter and on or about 1 August, 1924, the receiver of said Commercial National Bank of Wilmington paid to its depositors a dividend of 10% and among others said receiver paid to defendant, as representing said copartnership the sum of $380.69; subsequent thereto, without informing

plaintiff of the fact of the offset of defendant's individual note hereinbefore referred to, and leaving plaintiff to believe that a dividend of 10% upon the full and original deposit of $6,306.90 had been allowed and paid, defendant paid to plaintiff as his one-third part of a 10% dividend on said total deposit of $6,306.90 the sum of $210.23 and plaintiff accepted the same under the belief, induced as hereinbefore stated, that a dividend of 10% had been allowed and paid upon the full deposit, whereas in truth and fact, plaintiff is informed and believes and upon such information and belief alleges that the said receiver paid to defendant a dividend on said deposit less the amount of defendant's note offset as hereinbefore stated, to wit, a dividend on the sum of $3,806.90, and plaintiff's one-third part thereof being the sum of $126.89. Thereafter, and upon being informed of the facts as herein alleged, plaintiff demanded of defendant the payment of one-third part of the amount of $2,500 offset as hereinbefore alleged, and the payment of plaintiff's one-third part of the dividend paid upon the balance of said deposit after deducting said offset, less the amount of $210.23 paid to plaintiff by defendant as hereinbefore alleged, but defendant has failed and refused and continues to so fail and refuse to pay the amount demanded, or any other sum on account thereof. That by reason of the matters and things herein alleged defendant is indebted to plaintiff in the sum of $764.55 with interest on the sum of $749.99 from 1 August, 1924, at the rate of six per cent per annum. Wherefore, plaintiff prays judgment against defendant for the sum of $764.55 with interest on the sum of $749.99 from 1 August, 1924, until paid and for costs and such other relief as plaintiff may be entitled."

Defendant first demurred to the complaint. The demurrer was overruled and the defendant answered. The defendant admitted the material allegations of the complaint and, "he expressly refers to the agreement of dissolution therein referred to, for its terms and effect."

Defendant alleges: "That the sum of $210.23 was the full amount that the plaintiff was entitled to receive from the defendant, either under the terms of the dissolution agreement referred to, . . . or in law, or in equity; and the defendant alleges that is the only sum that he was due and owing the plaintiff on account of the said agreement or declaration of dividend, or otherwise, and that he does not owe the plaintiff any other amount by reason thereof, or for any other reason. The defendant denies the allegations that he owes plaintiff $764.55 with interest," etc.

The court below rendered the following judgment:

"This cause coming on to be heard before his Honor, Albion Dunn, judge of the Superior Court, and the plaintiff moving for judgment on the complaint filed by him, and the answer filed by the defendant; and

the defendant moving for judgment also on said pleadings, and the court, after hearing the arguments, being of the opinion that the plaintiff is not entitled to recover hereunder, hereby allows the motion of the defendant and adjudges that this action be dismissed at the cost of the plaintiff. It is further ordered, adjudged and decreed by the court, the defendant consenting thereto, that all dividends or payments to be made by the receiver of the Commercial National Bank shall be paid to the plaintiff in proportion of one-third of the original deposit in said bank at the date of its failure without regard to the offset heretofore allowed to the defendant, and that the balance of said dividends and payments shall be paid to the defendant."

Plaintiff duly assigned the following as error and appealed to the Supreme Court: "Error in the action of the court in rendering judgment in favor of the defendant upon pleadings. Error in the action of the court in refusing to render judgment in favor of plaintiff upon pleadings."

Ruark & Campbell for plaintiff.
Bellamy & Bellamy for defendant.

CLARKSON, J. On 30 December, 1922, the copartnership of L. W. Davis & Co., had on deposit with the Commercial National Bank of Wilmington, N. C., the sum of $6,306.90. On that date the bank was closed by order of the Comptroller of the Currency. On 1 February, 1923, a receiver for the bank was appointed. Plaintiff and defendant dissolved copartnership 14 March, 1923. At the time the bank was closed, defendant was individually indebted to the bank in the sum of $2,500. The receiver charged the individual indebtedness of defendant against the $6,306.90, leaving to the credit of the partnership the sum of $3,806.90. On 1 August, 1924, the receiver paid a 10% dividend to depositors—to these depositors $380.69. Defendant gave plaintiff of the amount $210.23.

Plaintiff contends that, under the dissolution agreement, the settlement should be as follows:

He was entitled to ⅓ of $2,500.00	$ 833.33
He was entitled to ⅓ of 380.69	126.89
	$ 960.22
Defendant paid him	210.23
Defendant owes plaintiff amount sued for	$ 749.99

Defendant contends the money in bank in the joint names was	$6,306.90
His portion was ⅔	4,204.60
Plaintiff's portion ⅓	2,102.30
	$6,306.90
That from his portion of his individual note should be deducted	2,500.00
Leaving his portion	$1,704.60
Plaintiff's portion	2,102.30
	$3,806.90

The dividend, 10%, received was $380.69. Plaintiff's portion he paid him was $210.23, and this was all he was entitled to receive.

This is the controversy for us to determine. Both parties, without citing any case like it to guide us, have left the matter for the Court like a "feather on the water." Both reason, as they contend, on general principles and come to opposite conclusions. "The construction of a contract, when in writing or agreed upon, is a matter of law for the courts." *Barkley v. Realty Co.*, 170 N. C., p. 482. "'If a contract is expressed in plain and unambiguous language, neither courts nor juries may disregard it and by construction or otherwise substitute a new contract in the place of that deliberately made by the parties.' *Engine Co. v. Paschal*, 151 N. C., 27; 7 A. & E. Enc., 118; *Dwight v. Ins. Co.*, 103 N. Y., 347." *Ollis v. Furniture Co.*, 173 N. C., 546.

In those written contracts which are sufficiently ambiguous or complex to require construction, the general rule is that the intention of the parties is the polar star. This can be gathered from the language of the entire instrument, the subject-matter, setting of the parties, the surrounding and attendant circumstances and the object they had in view. The same light which the parties possessed when the contract was made. Ordinarily, in arriving at the intent, words are used in the meaning generally accepted. If the words employed are capable of more than one meaning, the meaning to be given is that which it is apparent the parties intended them to have. 4 Page on the Law of Contracts, sec. 2020 *et seq.*; *R. R. v. R. R.*, 147 N. C., 382; *Simmons v. Groom*, 167 N. C., 271; *Lewis v. May*, 173 N. C., 100; *Ollis v. Furniture Co., supra; Miller v. Green*, 183 N. C., 652; *McCullen v. Daughtry, ante*, 215.

Applying these accepted rules of construction, the parties were partners, the plaintiff having one-third interest and the defendant two-thirds.

In the dissolution, plaintiff sold all the tangible property to the defendant and he assumed all debts. The choses in action were to be collected by either and the clear intention was that the division of the choses in action should be the same as before dissolution. When the question of the deposit in bank arose, the writing now in controversy, the idea was the same—"⅓ thereof to James S. King and ⅔ thereof to L. W. Davis." When the dissolution took place, the bank was in the hands of the receiver. Defendant owed the bank $2,500. He was entitled to two-thirds of the $6,306.90—$4,204.60. The receiver allowed the defendant to set off his share in the partnership account against his individual note. It did not and could not affect the interest of plaintiff's one-third in the fund. The language in the agreement in controversy "all dividends and payments on account of said deposit shall be divided," etc. The set-off against defendant's two-thirds portion of the fund was in no sense a dividend or payment under the contract clause in controversy.

"Set-off. A counter-claim or cross-demand; a claim or demand which the defendant in an action sets off against the claim of the plaintiff, as being his due, whereby he may extinguish the plaintiff's demand, either in whole or in part, according to the amount of the set-off." Black's Law Dic. (2 ed.), p. 1079, and cases cited.

The decision in *Blount v. Windley,* 68 N. C., 1, was on appeal to the Supreme Court of U. S., affirmed—95 U. S., 173 (L. Ed.), 424. *Mr. Justice Miller* says: "The idea of set-off is not the same as payment. It is doctrine of bringing into the presence of each other the obligations of A. to B. and of B. to A., and by the judicial action of the court make each obligation extinguish the other." 24 R. C. L., p. 796; *Putnam v. Russell,* 17 Vt., 54; 42 Am. Dec., 478.

After a careful consideration of this case, we are of the opinion that the judgment of the court below should be

Affirmed.

THOMAS BRADFORD v. I. MAC. ENGLISH.

(Filed 16 December, 1925.)

1. Employer and Employee—Master and Servant—Dangerous Employment—Sufficient Help—Tools and Appliances—Safe Place to Work.

Where, under the direction of the defendant's vice-principal, an employee is injured in the course of his employment in "ball-hooting" logs, *i. e.*: causing them to slide down a declivity on the ground, one side being peeled or skinned, to be further transported, and there is evidence tending to show that he was inexperienced therein and was injured in consequence of the

failure of his employer to furnish sufficient help ordinarily required, and certain implements used in such work of a simple nature: *Held*, sufficient evidence of the defendant's actionable negligence to take the issue to the jury.

2. Same—Nondelegable Duty.

It is a nondelegable duty of the employer to exercise ordinary care to furnish his employee suitable help and tools and appliances with which to do dangerous work within the scope of his employment.

3. Same—Implied Notice.

An employer of labor is held with notice of the customary and reasonable requirements necessary for his employee to perform, with reasonable safety, a duty within the scope of his dangerous employment, such as are ordinarily observed by other employers in like circumstances.

4. Same—Nondelegability of Employer's Duty.

The duty of an employer to furnish his employee a reasonably safe place to work, sufficient help and proper appliances, may not be shifted by intrusting this duty to the control of another employee.

5. Evidence—Nonsuit.

Upon a motion for judgment as of nonsuit upon the evidence, the evidence is to be taken in the view most favorable to the plaintiff.

6. Employer and Employee—Master and Servant—Negligence—Contributory Negligence—Evidence—Nonsuit.

Held, upon a motion to nonsuit under the facts of this case, an employee, in the discharge of a dangerous duty he owed to an employer was not barred of his recovery for the defendant's negligence by his alleged negligent failure to guard against a personal injury, under the circumstances of this case.

APPEAL by defendant from YANCEY Superior Court. *Oglesby, J.*

Action for damages on account of negligence. From a judgment for plaintiff the defendant appeals. No error.

Watson, Hudgins, Watson & Fouts for plaintiff.
A. Hall Johnston for defendant.

VARSER, J. Plaintiff was "ball-hooting" a "Wahoo" log down the mountain-side. "Ball-hooting" is the process of removing logs down a precipitous side of the mountain, where teams and other customary means cannot be used. The "run" side of the log is "skinned" and the log goes endwise by gravity until it reaches a place where other means can be used to move it. The log, a Wahoo or Indian Bitter, was about 14 inches in diameter and 12 feet long, and very heavy. Grover Anglin, foreman for defendant, was in charge of the laborers, one of whom was plaintiff. Anglin and a laborer were also getting out logs below the plaintiff and Grover Lewis. These two had cut a log from a tree on the

hill. They had an axe and a saw. When the log had been cut off Anglin came up and ordered plaintiff and Lewis to "peel the run of the log and slide it down." Peeling one side of the log makes it slide easily. "This was on the hillside, and the little end of the log was running first." When it was peeled plaintiff and Barnett started to "run" the log down and it "ran" until it "butted" against a fallen tree. This tree was larger than the Wahoo log and stopped its going when it struck it. Anglin, foreman, told Barnett to get the Wahoo log over the fallen log and "slide it on down the hill." Plaintiff and Barnett went, pursuant to orders, and tried to get the log over the obstruction. Each had a peavey. There were two peaveys in the crowd. Barnett went to the upper side and plaintiff to the lower side of the Wahoo log and both were on the upper side of the fallen hemlock log. By the continuous use of the peaveys, these two laborers got the Wahoo on top of the hemlock, and got it "balanced." The Wahoo then slued around scissors-like and caught the plaintiff and "rolled" him over the hemlock log, and then rolled over him and knocked him unconscious and seriously injured him.

When this was happening, Anglin, superintendent or foreman, and Lewis, were about 20 feet away. They only had a saw and an axe—no peaveys. Plaintiff was inexperienced in ball-hooting, but had seen men at different places ball-hooting. Plaintiff worked for defendant two days loading timber, and was injured on the third day about two o'clock in the afternoon. This was his first day's experience in getting logs down steep places in this manner.

In ball-hooting, five men are required—four men carry hooks—cant hooks with spikes in the ends—peaveys. Two men, each with a peavey, work at each end of the log. In this method they push the log down the steep incline and to keep it from a sudden turning, this injury to the laborers is usually prevented. One man cuts the brush and the four with the peaveys ball-hoot the log. When this method is pursued, the process is practically safe. Plaintiff says he did not ask for any more help because he thought it was the foreman's business to send men down and that he thought that the foreman knew his business.

When viewed, as in motions to nonsuit, evidence is ample to sustain these facts and to show that the injury resulted from the failure of the defendant to furnish a sufficient number of helpers equipped with proper and suitable tools, such as are in general and approved use in this business, and that it was impossible for the plaintiff and his colaborer, who had to be at the lower end of the log in order to get it up above the obstruction, to prevent the upper and heavier end from turning and catching the plaintiff between the green, heavy Wahoo log and the fallen hemlock log and seriously injuring him. There is no evidence that plaintiff was instructed in the method used or in its dangers, or knew of them.

Upon the evidence submitted, under appropriate allegations, we cannot sustain the defendant's exception to the refusal of the court below to grant his motion to dismiss as upon nonsuit. The defendant relies upon *Angel v. Spruce Co.*, 178 N. C., 621. This case is different from the instant case, for that its facts are as follows: The plaintiff, Angel, and one, Willard Gregory, an employee of Spruce Co., were engaged in getting out timber from defendant's land, and in the course of their employment had cut down a tree that fell so as to make it inconvenient to saw it into logs. With the view of giving this tree a better placing they proceeded to cut off the branches and top of the tree and as they cut the latter the body of the tree rolled down on Spruce's foot injuring it. Spruce had long been engaged in work of this kind and this particular job was well within his experience and training and he was left largely to his own methods of doing it. A similar case is *Rumbley v. R. R.*, 153 N. C., 457; Also, *Simpson v. R. R.*, 154 N. C., 51; *Bunn v. R. R.*, 169 N. C., 648. In *Winborne v. Cooperage Co.*, 178 N. C., 88, the Court, speaking through *Hoke, J.*, says: "In order for liability to attach in case of simple everyday tools, it must appear, among other things, that the injury had resulted from a lack of such tools or defects therein which the employer is required to remedy, in the proper and reasonable discharge of his duties and that the lack or defect complained of and made the basis of the charge is of a kind from which some appreciable and substantial injury may be reasonably expected to occur." In *Rogerson v. Hontz*, 174 N. C., 27, the Court set aside an order of nonsuit, for that it appeared that the plaintiff was seriously injured by reason of a defective cant hook, and the evidence tended to show that this cant hook was an "implement suitable to the work and which the employer should supply."

If it was necessary to furnish, in these cited cases, such a suitable tool as a cant hook, it must needs be necessary in the instant case, to furnish helpers in sufficient number with peaveys, which are practically the same as cant hooks with the iron spike in the end of the staff, so that the injuries likely to flow therefrom will be guarded against in a reasonable manner. The instant case comes within *Tate v. Mirror Co.*, 165 N. C., 279; *Pigford v. R. R.*, 160 N. C., 101. An employer of labor may be held responsible for directions given, or methods used by reason of which an employee is injured. It is as much the duty of the master to exercise due care to provide the servant with reasonably safe means and method of work, such as proper assistance in the performance of his task, as it is to exercise due care to furnish him a safe place and proper tools and appliances. *Smith v. R. R.*, 182 N. C., 296; *Tritt v. Lumber Co.*, 183 N. C., 830; *Gaither v. Clement*, 183 N. C., 450 (this

case contains a clear and satisfactory discussion of the master's duty to exercise ordinary care to perform the duties required of him by law in relation to his employees); *Owen v. Lumber Co.,* 185 N. C., 612; *Murphy v. Lumber Co.,* 186 N. C., 746. This is a primary, absolute and nondelegable duty. When he entrusts the control of his employees to another, the duty is not shifted and the master is responsible for the proper exercise of the authority with which he vests his representative, and he is liable for any abuse of it, (*Southwell v. R. R.,* 189 N. C., 417, 420; *Hollifield v. Tel. Co.,* 172 N. C., 714, 725; *Ainsley v. Lumber Co.,* 165 N. C., 122; *West v. Tanning Co.,* 154 N. C., 44; *Hamilton v. Lumber Co.,* 156 N. C., 523; *Norris v. Mills,* 154 N. C., 474; *Shives v. Cotton Mills,* 151 N. C., 290; *Holton v. Lumber Co.,* 152 N. C., 68; *Shaw v. Mfg. Co.,* 146 N. C., 235, 239; *Tanner v. Lumber Co.,* 140 N. C., 475; *Allison v. R. R.,* 129 N. C., 336; *Means v. R. R.,* 126 N. C., 424; *Mason v. Machine Works,* 28 Fed., 228; *R. R. v. Thompson,* 200 U. S., 206; *R. R. v. Herbert,* 116 U. S., 642), to the same extent as if he had been personally present and acting in that behalf himself. The evidence tends to establish that defendant's foreman was observant of what plaintiff was doing and his efforts to comply with his directions; and the jury has found that in the exercise of that degree of care that a prudent man would have exercised under similar circumstances, he knew or ought to have known that injury was likely to result, because there were an insufficient number of helpers equipped with proper tools with which to guide the log and prevent its sudden turning. It is the duty of the master to exercise due care to have a sufficient force to do the work at hand and to furnish to plaintiff while he was in the discharge of his duties a reasonably safe place in which to work. *Pigford v. R. R., supra; Hollifield v. Tel. Co.,* 172 N. C., 715, 725; *Shaw v. Mfg. Co.,* 146 N. C., 235. The employer's duty to exercise ordinary care to furnish reasonably safe and suitable tools and appliances is clearly set forth in *Orr v. Tel. Co.,* 130 N. C., 627; *Cotton v. R. R.,* 149 N. C., 227.

The defendant has abandoned all exceptions, save that made to the court's refusal to grant his motion of nonsuit. As often said by this Court in considering such motions, the evidence must be construed most favorably for the plaintiff, and upon the evidence disclosed in the case at bar, whether plaintiff acted as a prudent man would have done under similar circumstances, is a question peculiarly within the province of the jury. *Reid v. Rees,* 155 N. C., 233.

The defendant further contends that the danger was obvious and that the plaintiff's own evidence is sufficient to establish this fact. We do not so conclude. Plaintiff's evidence fully justified the jury in finding that he was without actual experience in ball-hooting prior to the day of the

injury. He had seen this done on different occasions, but had never engaged in it before. His other work in lumbering was different from this, and, therefore, the plaintiff does not come within the rules set forth in the cases noted herein as cited by the defendant. The evidence further tends to justify the finding that the defendant well knew the dangers incident to this process and that it is the approved method to furnish a sufficient number of laborers with suitable appliances so that each one may be prevented from injury, such as was received by plaintiff. Plaintiff says that if he had been on the other side of the log, he would not have been injured; this does not change the degree of care required of the defendant, of necessity, either the plaintiff or Barrett had to be where the plaintiff was. Therefore, the jury had sufficient evidence to find that a reasonably prudent master in the exercise of due care would have known that in getting the Wahoo log over the obstruction, one laborer must be on either side of the log, and that it was reasonable to apprehend that injury might result if the upper and heavier end of the log was not handled with suitable appliances and sufficient help, and that, in the exercise of due care, such a master would have so provided.

Let it be certified that, in the trial, there was

No error.

J. F. FLOWERS, RECEIVER OF UNITED MERCANTILE COMPANY, v. C. L. SPEARS, G. H. LOWDER AND C. V. LOWDER, COPARTNERS, TRADING AS LOWDER BROTHERS, AND B. A. FORD.

(Filed 16 December, 1925.)

1. Evidence—Banks and Banking—Books—Entries—Canceled Checks—Hearsay.

Where the purchaser of a truck claims title by payment by canceled check on a local bank, and thus raises this issue, it is competent for the cashier of a bank of which the payee bank was a branch, and who had supervision and control thereof, to testify that a check of the amount claimed at the time of the transaction in controversy, was paid by the local bank in confirmation of the plaintiff's evidence as appeared from the book of record of the local bank, and to offer the same in evidence; and this evidence was not objectionable as hearsay on account of the witness not having personally handled the said check or made the record thereof.

2. Sheriffs—Attachment—Execution—Notification by True Owner—Sale—Damages—Title.

Where the sheriff has seized under levy of attachment personal property, and has been notified by a stranger to the action that he is the owner

thereof and that should the sheriff sell the same it would be at his own peril, the party so notifying is not estopped to maintain his action for damages against the sheriff and the sureties on his bond, or in the proceedings, and to establish his title as a condition to his recovery.

3. Official Bonds—Actions—Parties.

One whose property has been attached by a sheriff, under a warrant issued in an action to which he is not a party, may intervene or interplead in the action and claim ownership, and obtain an order for the release of the property attached, C. S., 829, 840; or he may bring action against the sheriff and the sureties on his official bond for the property or damages for its conversion, or against the plaintiff in the action at whose instance the warrant was issued, and the property wrongfully attached with option of joining the sheriff therein, or if the sheriff has taken an indemnity bond he may sue the obligor and sureties thereon.

APPEAL by defendants from judgment of Superior Court of CABARRUS County, April Term, 1925, *Shaw, J.* No error.

Action to recover damages for the wrongful conversion of a Ford truck, alleged to be the property of plaintiff. Said truck was levied upon by defendant, C. L. Spears, sheriff of Cabarrus County, on 7 July, 1922, under warrants of attachment issued by the Superior Court of said county in actions instituted in said court by defendants, Lowder Brothers, and B. A. Ford against Kannapolis Local Union No. 1238, Textile Workers of America, and W. G. Walter. B. A. Ford was surety upon the undertaking filed by Lowder Brothers, and Lowder Brothers were sureties upon the undertaking filed by B. A. Ford, in said actions. The said Ford truck was sold by the defendant, C. L. Spears, under executions issued upon judgments rendered in said actions, on 25 November, 1922, and the proceeds of said sale were applied as payments on said judgments under orders of the court. Defendants denied that plaintiff, J. F. Flowers, receiver, or that United Mercantile Company was the owner of said truck at the time same was levied upon and seized by the sheriff.

The jury answered the issues submitted to them as follows:

1. Was plaintiff the receiver of the United Mercantile Company as alleged in the complaint? Answer: Yes.

2. Was the plaintiff the owner and entitled to the possession of the truck as set out in the complaint? Answer: Yes.

3. If so, did the defendants wrongfully convert said truck as set out in the complaint? Answer: Yes.

4. What damage, if any, is plaintiff entitled to recover? Answer: $300.

From judgment on this verdict, defendants appealed to the Supreme Court.

Hartsell & Hartsell for plaintiff.
H. S. Williams for defendant.

CONNOR, J. The United Mercantile Company, a corporation, was organized on 2 April, 1921; thereafter, and until 24 July, 1922, when plaintiff, J. F. Flowers, was appointed receiver of said company, by the Superior Court of Cabarrus County, it was engaged in the mercantile business at Kannapolis, N. C.

There was evidence tending to show that on or about 14 April, 1921, said company bought from R. M. Housel a Ford truck, paying therefor $701.66. Mr. Housel testified that this sum was paid to him at the time he delivered the truck to the company. C. W. Swink, cashier of Cabarrus Savings Bank, identified a sheet of paper handed him, while testifying as a witness for plaintiff, as the sheet from the bank's ledger upon which the account of the United Mercantile Company was kept by the said bank. He was requested by plaintiff's attorney to state whether or not said sheet showed that a check for $701.66 was charged on said account. Defendants objected. Before complying with said request, in answer to questions of defendants' counsel, witness stated that he did not make the entries on said sheet; that they were made by a bookkeeper, employed by said bank at its branch at Kannapolis; that witness went occasionally from his office at Concord to Kannapolis and there examined the branch bank, and looked over its business; that the sheet shown was a part of the bank's records. Defendants' objection was overruled. The witness then stated that the sheet showed that a check for $701.66 was charged on 15 April, 1921, to the account of the United Mercantile Company. Defendant excepted. Plaintiff then offered the sheet in evidence for the purpose of corroboration. Defendants' objection was overruled and defendants excepted.

Defendants' assignments of error based on these exceptions cannot be sustained. R. M. Housel had testified that he received the sum of $701.66 at the time he delivered the truck to the United Mercantile Company. This testimony was offered as evidence that the United Mercantile Company paid the purchase price for the Ford truck. It was competent for that purpose. The issue submitted to the jury involved the ownership of the truck. The testimony was relevant as evidence upon the question of ownership. The testimony of the cashier of the bank was competent as evidence that the sheet exhibited to him was a part of the records of the bank. See *S. v. Hendricks,* 187 N. C., 327.

The fact that the cashier did not make the entries in the account shown on the sheet did not render his testimony incompetent. The entries were made by a bookkeeper, employed by the bank, who was under the supervision of the cashier. The fact that the cashier did not

personally handle the check and that he had no personal knowledge of the transactions recorded in the account, as shown by the sheet, did not render his testimony incompetent as based upon hearsay. *Ins. Co. v. R. R.*, 138 N. C., 42; *Currie v. Davis* (S. C.), 126 S. E., 119. In both these cases, a record containing entries made in the usual course of business on train sheets by a train dispatcher, who testified as a witness, from reports telegraphed to him by station agents as to the arrival and departure of trains at their stations, was held competent evidence for the purpose of showing the position of a train at a certain time. In the instant case while the entries were not made by the cashier, they were made by a bookkeeper under his supervision and were accepted as correct by both the bank and the United Mercantile Company in their dealings with each other.

Nor does the testimony violate the well established rule that a litigant cannot be affected by the words and acts of others with whom he is in no way connected, and for whose sayings and doings he is not legally responsible. 22 C. J., 741. The record was offered not as evidence against defendants, but in support of the testimony of witnesses for plaintiff. In *Falls v. Gamble,* 66 N. C., 455, this Court held that evidence in regard to entries on a school register, offered for purposes of corroboration, of testimony as to the age of the grantor in a deed, was competent, *Chief Justice Pearson* saying: "The rule, *res inter alios acta,* has no application." 22 C. J., 743. *S. v. Morris,* 84 N. C., 756.

Defendants in their answer, by way of further defense to plaintiff's cause of action, allege "that the officers and representatives of said United Mercantile Company and J. F. Flowers, the attorney and now receiver of said company, knew or by the exercise of due and reasonable care and diligence could have known of all the proceedings had in the said cases (*i. e.,* the actions brought by defendants in which warrants of attachment under which the sheriff levied upon said truck as the property of Kannapolis Local Union No. 1238 and W. G. Walter were issued) of the time and place of sale of said Ford truck, since the time and place were widely and extensively advertised and that they at no time made and filed any protest or objected to the sale of the said Ford truck."

Upon the trial, defendants tendered as issues, in addition to those submitted by the court, the following:

"1. Is the plaintiff, by reason of his conduct and the conduct of the officers and representatives of the United Mercantile Company, estopped from maintaining this action against the defendants?

"2. Did the plaintiff, by his own acts and conduct and the acts and conduct of the officers of the United Mercantile Company, waive any

claim he might have had to maintain an action for damages for and on account of the seizure and sale of said truck?"

The court refused to submit these issues and defendants excepted and assign such refusal as error.

The warrants of attachment were issued on 7 July, 1922; on the same day defendant, C. L. Spears, sheriff, levied upon the Ford truck as the property of the defendants in said actions, to wit, Kannapolis Local Union No. 1238 and W. G. Walter; on 10 July, 1922, J. F. Flowers wrote to the sheriff advising him that he represented the United Mercantile Company and that the truck which he had seized was the property of said company and not the property of defendants in said action; he demanded the release of said truck from the levy and notified the sheriff that the United Mercantile Company would insist upon its rights as owner of the said truck.

Neither of the defendants in said actions filed answer, and on 4 September, 1922, judgment was rendered in each action in favor of the plaintiff therein and against the defendants for the amount claimed, it was further adjudged that the Kannapolis Local Union No. 1238, Textile Workers of America and W. G. Walter were the owners of the truck and other property attached by the sheriff; thereafter executions were issued upon said judgments and on 25 November, 1922, the sheriff under said executions sold the said truck at the courthouse door in Cabarrus County.

On 14 July, 1922, J. F. Flowers was appointed receiver of the United Mercantile Company by the Superior Court of Cabarrus County. Neither he nor anyone else representing the United Mercantile Company attended the sale of the said truck on 25 November, 1922.

The assignments of error based upon exceptions to the refusal of the court to submit the issues tendered by defendants cannot be sustained. No facts are alleged in the answer sufficient to support the defense that plaintiff was estopped or had waived his right to maintain this action, upon an allegation that he, as receiver of the United Mercantile Company, was the owner of the Ford truck, at the time it was seized and also at the time it was sold by the sheriff. Nor was there evidence from which the jury could find such facts. There is no contention that plaintiff was estopped by the judgments rendered in the actions, in which neither he nor the United Mercantile Company was a party. It is contended, however, that he is estopped because, with knowledge that the sheriff had seized said truck under the warrants of attachment, he did not intervene or interplead in the actions, and claim the truck as his property, and that by his failure to do so, prior to the sale, which had been extensively and widely advertised, he had waived the

right to assert his ownership of the truck in an action to recover damages for conversion. These contentions are not well founded.

One whose property has been attached by a sheriff, under a warrant issued in an action to which he is not a party, may intervene or interplead in the action, and demand judgment that he is the owner of the property, and an order directing the sheriff to release the property, C. S., 829-840. Or he may bring an action against the sheriff and the sureties on his official bond for the property or for damages for its conversion. *Stein v. Cozart,* 122 N. C., 280. Or he may bring an action against the plaintiffs in the action, at whose instance the warrant was issued, and the property wrongfully seized, joining the sheriff as a defendant or not as he sees fit; if the sheriff has taken an indemnity bond, he may sue the obligor and the sureties on such bond. *Tyler v. Mahoney,* 168 N. C., 237; *Martin v. Buffaloe,* 128 N. C., 305; *Gay v. Mitchell,* 146 N. C., 510; *Latham v. DeHart,* 183 N. C., 657. Plaintiff, as attorney for the United Mercantile Company, upon learning that the sheriff had levied upon and seized the truck, promptly wrote to the sheriff, advising him that this truck was the property of his client, and not of the defendants in the actions in which the warrants of attachment were issued. He warned the sheriff that his client would hold him liable for the seizure. The sheriff retained the truck and sold it, under the executions, at his peril. There is no evidence of any intention on the part of plaintiff, or of the United Mercantile Company prior to his appointment as receiver, to relinquish claim of ownership of the truck. There was no waiver of right to maintain this action, *Mfg. Co. v. Building Co.,* 177 N. C., 107. There was no error in declining to submit the issues tendered by defendants.

We have examined the assignments of error based upon exceptions to instructions of the court to the jury. The controversy between the parties to this action involved the ownership of the Ford truck. This controversy was determined by the jury's answer to the second issue. The jury having found that plaintiff was the owner of the truck, as alleged in the complaint, upon the admission in the answer and upon all the evidence there was a wrongful conversion, for which all the defendants are liable to plaintiff. There was no exception to the evidence, or to the instructions relative to the issue as to damages. The judgment must be affirmed. There is

No error.

BOARD OF EDUCATION OF ORANGE COUNTY v. THOMAS J. FORREST AND JAMES O. WEBB.

(Filed 16 December, 1925.)

1. **Education—Public Schools—Playgrounds—Condemnation—Statutes.**

Under the provisions of C. S., 5416, the board of education of a county may acquire for public school purposes lands not exceeding two acres for the necessary buildings for the school, including playgrounds for the scholars, and having acquired by deed a portion of the necessary lands may afterwards acquire by condemnation additional and adjoining lands, not exceeding the statutory limitation, when in the sound discretion of the school board they appear necessary for the purposes of the school. This section is not affected by C. S., 5469 (vol. III), as to limiting the board to acquire such property for the school building sites, etc., only by condemnation.

2. **Same—County Board of Education—Discretionary Powers—Courts.**

The county board of education in acquiring by condemnation additional lands to be used as a playground to a public school, acts within its sound discretion, with which the courts seldom interfere.

APPEAL by plaintiff from a judgment rendered by *Grady, J.*, 5 October, 1925.

The plaintiff filed a petition in the Superior Court of Orange to condemn for school purposes a lot containing 1.09 acres. The defendant, Webb, filed an answer, and his Honor, hearing the case by consent of parties, found the following facts:

1. That on 9 April, 1925, the board of education of Orange County, North Carolina, duly instituted in the Superior Court of Orange County an action against Thomas J. Forrest for the purpose of condemning a tract of land described in the pleadings, containing 1.09 acres, for the use and benefit of the Efland High School, and in order to carry out the original plans and arrangements for said school and for necessary playgrounds and entrance to said school building, which said school building had been erected during the fall of the year 1924, as hereinafter set forth; that at the time of instituting said action the said Thomas J. Forrest was a nonresident of the State of North Carolina, living in Atlanta, Ga., and an order of publication of summons was duly issued by the clerk of the Superior Court of Orange County in said action on 9 April, 1925, requiring the said defendant to appear at the offices of the clerk of the Superior Court of Orange County on 11 May, 1925, and answer or demur to the petition filed in said cause, and that said summons was duly published as required by statute.

2. That on 9 April, 1925, the plaintiff filed a petition praying for the condemnation of the property belonging to the defendant described herein.

3. That on 29 April, 1925, and on 1 May, 1925, the plaintiff duly filed and docketed in the office of the clerk of the Superior Court of Orange County notice of *lis pendens* as required by statute.

4. That the defendant James O. Webb secured a deed from Thomas J. Forrest for said premises, dated 2 March, 1925, acknowledged in Fulton County, Ga., by the grantor, before a notary public on 30 April, 1925, and probated by the clerk of the Superior Court of Orange County on 6 May, 1925, and filed for registration in the office of the register of deeds for Orange County on 6 May, 1925. That payment for said land was made by the defendant, James O. Webb, by check which was dated and mailed on 24 April, 1925.

5. That on 29 April, 1925, the plaintiff duly issued summons against Thomas J. Forrest and James O. Webb, which said summons was served by the sheriff of Orange County on 30 April, 1925, and personally served on the defendant, James O. Webb, on 30 April, 1925, and that on the same day the plaintiff filed an amended complaint against the said Thomas J. Forrest and James O. Webb, praying for the condemnation of said property for the purposes set out in said petition and amended petition, and upon an affidavit duly filed at said time, alleging that the said defendant, James O. Webb, had entered into possession of said property and was beginning to plow up, ditch and lay off streets on the same, and that Hon. Thomas H. Calvert, judge, holding courts of the Tenth Judicial District, issued a restraining order enjoining and restraining the said James O. Webb, his servants, agents and attorneys, from going upon said land, and that the hearing of said restraining order was postponed by consent of the parties and without prejudice from time to time until the same came regularly on to be heard before the undersigned judge holding the courts of the Tenth Judicial District.

6. That prior to 9 June, 1924, the board of education of Orange County, in regular session assembled, decided to consolidate the schools of Orange County and in pursuance to said plan of consolidation decided to locate the school building for Cheek's Township at Efland, N. C., and that on 9 June, 1924, said board of education in regular session assembled went to Efland in said Cheek's Township, Orange County, and after examining various sites, selected a site for said school building, containing a fraction over 6 acres of land, and thereafter, on 27 June, 1924, caused a survey of said site to be made by R. M. Trimble, C. E., that said site so selected as a suitable school site by said board of education was composed of two parcels of land, one parcel containing five and a fraction acres, and owned by J. M. Freeland and George J. Freeland, and another parcel containing 1.09 acres owned at that time by the defendant, Thomas J. Forrest: that a street, road, or alleyway, runs between said lots as shown by said plot, said street, road or alleyway

being ten feet in width, and two feet of western portion thereof being included in the deed which conveyed the property now in question to the defendant, T. J. Forrest. That a plot of said land is hereto attached and made a part of this judgment. That the board of education thereafter on 19 July, 1924, purchased the five and a fraction acres owned by J. M. Freeland and George J. Freeland, and a deed for said property was duly executed by said owners and delivered to the plaintiff and duly recorded in the office of the register of deeds of Orange County on 29 July, 1924, and the purchase price was duly paid.

7. That on 9 June, 1924, the time said site was selected by the board of education, no notice thereof was given to Thomas J. Forrest or James O. Webb, and neither said Thomas J. Forrest nor James O. Webb were present, but that the board of education understood from a brother of Thomas J. Forrest that there would be no trouble in securing the land from Thomas J. Forrest, though the said brother, S. C. Forrest, denies under oath that he ever did anything by word or act that would lead the board of education to any such understanding. That the board of education proceeded, immediately following the selection of the site, to erect a modern school building on the five and a fraction acres which had been bought from J. M. Freeland and George J. Freeland, and that said building was completed and school opened therein about the first of January, 1925.

8. That immediately after the site for said school building was selected on 9 June, 1924, as set out in paragraph 6 above, the board of education endeavored to get title to the lot belonging to Thomas J. Forrest communicating direct with said Thomas J. Forrest, but were unable to effect the purchase of said lot at a satisfactory price, and reported this fact to the secretary of said board at its meeting in December, 1924, and at that time passed a resolution directing said secretary to have proceedings instituted to condemn the lot of 1.09 acres belonging to T. J. Forrest, but pending further efforts to purchase, no condemnation was begun until April, 1925.

Upon the foregoing facts it was adjudged that the plaintiff has no legal right to condemn the lot as a part of the site of the Efland High School, said school now having a site of more than five acres and the lot in question not having been secured by purchase or condemnation at the time the school building was erected. It was also adjudged that the restraining order be dissolved. The plaintiff excepted and appealed.

Gattis & Gattis and W. J. Brogden for plaintiff.
A. H. Graham and R. O. Everett for defendants.

ADAMS, J. From the wording of the judgment we infer his Honor was of opinion that the plaintiff is not entitled to the relief demanded

because the county board of education did not purchase or condemn the lot in suit at the time title was acquired to the five acres. In this we think there is error. It was formerly provided (C. S., vol. II, sec. 5416), that the county board of education or the board of trustees of any incorporated or chartered school district might acquire sites for school buildings by donation or purchase, and not more than two acres by condemnation; and, further, that a proceeding might be instituted to condemn more land in a district where a house or a site had previously been obtained, the site and the additional lot not to exceed three acres. In 1921 this section was amended by striking out "not more than two acres" and substituting "not more than ten acres" (Laws 1921, ch. 179, sec. 18), and in 1923 it was repealed (Laws 1923, ch. 136, sec. 373) and thereafter superseded by C. S., vol. III, sec. 5469, in which it is again provided that not more than ten acres may be condemned. The amendment of 1924 is not material. Laws, Ex. Sess., 1924, ch. 121. Section 5416 sanctioned the condemnation of such additional land, not exceeding the area limited by the statute, as was deemed necessary to provide suitable sites. It is contended by the defendant that this section has been substituted by C. S., vol. III, sec. 5469, and that the latter statute confers authority "only to acquire property by condemnation for school purposes or school buildings." But the county board of education is expressly empowered to acquire title to "suitable sites." Section 5469. The meaning of the word "site" as used in the statute is broad enough to embrace such land, not exceeding the statutory limit, as may reasonably be required for the suitable and convenient use of the particular building; and land taken for a playground in conjunction with a school may be as essential as land taken for the schoolhouse itself. 24 R. C. L., 582, sec. 31.

It appears in the statement of facts that the plaintiff, after deciding to consolidate the schools, selected as a site for the building a lot of more than six acres including the lot in question; that upon the reasonable assumption that title to each lot could be acquired by purchase the plaintiff erected a modern school building on the five-acre lot; and that afterwards it became necessary to condemn the lot in controversy. In all these matters the plaintiff was acting in the exercise of a discretion with which the courts seldom interfere. *McInnish v. Bd. Ed.,* 187 N. C., 494; *School Committee v. Board of Education,* 186 N. C., 643; *Davenport v. Board of Education,* 183 N. C., 570; *Pemberton v. Board of Education,* 172 N. C., 552; *Venable v. School Committee,* 149 N. C., 120.

Under the judge's findings of fact the process of acquiring title to the five-acre lot by purchase and to the one-acre lot by condemnation may be regarded as separate stages in the accomplishment of a common purpose to appropriate both lots for the benefit of the school. Otherwise the plaintiff's original purpose would be defeated. If both lots were

selected at the same time as a site for the school and only one could be purchased, we see no satisfactory reason for denying to the plaintiff the right to condemn the other. We have given to the appellee's brief our careful consideration but find no authority, as we understand the law, which antagonizes our conclusion. The judgment is

Reversed.

SARAH K. HAYWORTH v. PHILADELPHIA LIFE INSURANCE COMPANY.

(Filed 16 December, 1925.)

1. Insurance—Premiums—Extension Notes.

Stipulation in a note given for the payment of the premium on a policy of life insurance extending the time for payment, that the policy will be void if not paid at maturity, is valid.

2. Same—Payment—Unpaid Checks—Contracts.

Where a life insurance company accepts a check of the insured for the payment of a premium, or an extension premium note, and the check is not paid by the drawee bank, and when the cancellation of the extension note by the company is upon condition that the check will be paid, and upon its nonpayment, a provision in the note declaring the policy void if the note is not paid by or before maturity, is valid and enforcible.

3. Contracts—Written Terms—Insurance—Policies—Extension Notes.

Where the contract for the extension of the payment of the premium on a life insurance policy is clear, its valid stipulations as to the conditions of the extension note will be enforced in accordance with their terms.

APPEAL by plaintiff from ROWAN Superior Court. *Lane, J.*

Action to recover on insurance contract. From a judgment sustaining defendant's demurrer, plaintiff appealed. Affirmed.

The material facts appearing in the complaint are as follows:

Defendant issued 24 September, 1920, a policy of insurance on the life of John B. Hayworth, payable to plaintiff at the death of the insured, her husband. Premium $100.08 per year, payable in advance. The first premium was duly paid and the policy delivered on its date. When the second premium became due 24 September, 1921, the insured paid defendant cash $27.33, and delivered to it three notes of $25.00 each, payable 24 December, 1921, 24 March, 1922, 24 June, 1922 respectively. The note due 24 December, 1921, was paid. These notes each contained the following: "That if this note is not paid at its maturity or at the expiration of any period to which it shall be extended, the said insurance contract No. 58160 shall lapse, and all further liability of

said Philadelphia Life Insurance Company on account of said contract shall immediately cease and determine." This provision was subject to other privileges and provisions not material to this case, except it is provided that "no personal liability accrues under this note, and in event of nonpayment the sole remedies of the company shall be as stated herein."

When note due 24 March, 1922, came due, the defendant agreed with the insured to extend its payment to 6 June, 1922, upon receipt of approved personal health certificate and check for $25, post-dated 6 June, 1922, and in receipt thereof, defendant wrote the insured that, "we have extended the time for the payment of your note to 6 June, 1922, on which date we will deposit your check and forward this note to you." This check was written 8 May, 1922, drawn on the Bank of Lexington, at Lexington, N. C., and was deposited for collection in the city of Philadelphia, 7 June, 1922, presented at the Bank of Lexington for payment 9 June, 1922, payment refused for that the insured did not have sufficient funds in the bank to pay the same, and on 7 June, 1922, when the check was deposited for collection, defendant stamped the note "paid," and returned the same to the insured. The insured on 6 June, 1922, had sufficient funds in the Bank of Lexington to pay said check. The defendant 22 June, 1922, wrote the insured that his check dated 6 June, 1922, had been returned unpaid, further stating: "As this check was given in payment of your note of $25 together with accrued interest of 60 cents, due by extension 6 June, 1922, on your policy No. 58160, this policy has lapsed for nonpayment of this note."

There was a further statement in this letter that they would be glad to receive his remittance for the note and reinstate the policy if the remittance was received on or before 3 July, 1922, and if a health certificate (a form enclosed) should be received and approved by the defendant's medical department. The insured died 23 June, 1922.

The policy, among other things, provided that the "failure to pay any premium or note when due will forfeit the policy and all payments thereon."

The defendant demurred *ore tenus* to the complaint and the court below sustained the demurrer.

Z. I. Walser and R. Lee Wright for plaintiff.

Rendleman & Rendleman and Stewart, McRae & Bobbitt for defendant.

VARSER, J. An action was instituted in the Superior Court of Davidson County between the same parties, and on the same policy, and removed to the District Court of the United States, at Greensboro, and

there tried. In this first action, $6,000 was demanded on account of the double indemnity provision in the policy. Plaintiff there recovered, but, upon writ of error in the Circuit Court of Appeals, the judgment in favor of the plaintiff was reversed, and the action remanded for a new trial.

Upon examination of the authorities we are convinced that the reasoning contained in the opinion of *Circuit Judge Rose* is not only clear and satisfactory, but is supported by the prevailing authorities, and that the plaintiff cannot recover. *Philadelphia Life Ins. Co. v. Hayworth,* 296 Fed., 339.

When this action was remanded to the district court at Greensboro, the plaintiff submitted to a voluntary nonsuit and instituted the present action in Rowan Superior Court, claiming only $3,000, not declaring upon the double indemnity provision of the policy.

The facts stated in the complaint, as set out above, were the established facts upon which the Circuit Court of Appeals rendered its opinion. We feel that it would be unnecessary to submit further reasons than those given in this opinion. However, in addition to the authorities cited in that opinion, there are other decisions from this State fully supporting the conclusions therein reached.

When a note is given for the payment of the premium in a life insurance policy and the note and the policy contain a stipulation that, upon the failure to pay the note at maturity, the policy shall cease and determine, then a failure so to pay such premium note renders the policy void. *Ferebee v. Ins. Co.,* 68 N. C., 11; *Sexton v. Ins. Co.,* 157 N. C., 142; *Sexton v. Ins. Co.,* 160 N. C., 597; *Murphy v. Ins. Co.,* 167 N. C., 334, 336; *Perry v. Ins. Co.,* 150 N. C., 145; *McCraw v. Ins. Co.,* 78 N. C., 149; *Underwood v. Ins. Co.,* 177 N. C., 327, 334.

It is, also, further established in this jurisdiction that, "in the absence of an agreement to the contrary the delivery of a check by the debtor to the creditor, and the acceptance by the creditor of the check, is not payment of the indebtedness until the check has been paid." *Graham v. Warehouse,* 189 N. C., 536; *Bank v. Barrows,* 189 N. C., 303; *Wilson v. Jennings,* 15 N. C., 90; *Spear v. Atkinson,* 23 N. C., 262; *Mauney v. Coit,* 86 N. C., 463; *Bank v. Hollingsworth,* 135 N. C., 571; *Chemical Co. v. McNair,* 139 N. C., 334. In *Ins. Co. v. Durham County, ante,* 58, the Court says: "The checks which were not paid do not constitute payments." The premium note was not paid. A worthless check is not a payment. There is no fact in the complaint that tends to show that the check was accepted as a payment. It was a conditional payment and when it was not paid the condition which prevented it from operating as a payment, happened, and the policy lapsed. The failure to have the funds in the bank to meet the check was the

fault of the drawer, and no loss resulted from any delay on the part of the payee.

When such a provision of forfeiture appears in the policy and in the premium note there is no room for construction, the intent of the parties is clear, and the courts must enforce these contracts as made. The forfeiture occurred and plaintiff cannot recover. *Pitt v. Berkshire Life Ins. Co.*, 100 Mass., 500; *Crofton v. Home Ins. Co.*, 199 Ky., 517, 251 S. W., 992. When the note contains the forfeiting stipulation and the policy does not, nonpayment is fatal according to *Holly v. Metropolitan Life Ins. Co.*, 105 N. Y., 437; *Resseler v. Fidelity Life Ins. Co.*, 110 Tenn., 411. See, also, *Hale v. Michigan Farmers Mutual Ins. Co.*, 148 Mich., 453; *Underwood v. Security Life & Annuity Co.*, 108 Tex., 381. An interesting note on this subject is in Yale Law Journal, vol. 35, No. 2. December, 1925, 236.

We conclude the judgment below must be

Affirmed.

VERA GIBSON, ADMINISTRATRIX OF ELDRIDGE GIBSON, v. STEELE'S MILLS, INCORPORATED.

(Filed 16 December, 1925.)

1. **Negligence — Evidence — Proximate Cause—Burden of Proof—Electricity.**

In an action to recover damages for the death of an employee caused by the negligence of defendant, evidence which tends to show that the deceased was employed in defendant's store operated in connection with defendant's cotton mill, and also to a refrigerating plant operated by electricity in a room opening into the store; that the deceased was found dead in the refrigerating room and that the metal parts within the room were charged with a deadly voltage of electricity caused by the live wires carrying the electricity not being properly grounded: *Held*, sufficient upon the issue of defendant's actionable negligence as the proximate cause of the death to take the case to the jury, with the burden of proof on plaintiff.

2. **Negligence — Contributory Negligence — Evidence—Instructions—Directing Verdict.**

Where an employee is killed by the negligence of his employer for failing to properly ground electric wires in a refrigerating plant where the employee was required to go in the discharge of his duties, and the answer alleges that the deceased would have been safe had he confined himself to a part of the room where his duties required him, upon the plea of contributory negligence it was necessary for the defendant to offer evidence upon the ground of his defense, and on his failure to have done so it was not error for the trial judge to direct a verdict in plaintiff's favor upon the issue.

GIBSON *v.* STEELE'S MILLS.

APPEAL by defendant from judgment of Superior Court of RICHMOND County, July Term, 1925, *McElroy, J.* No error.

Action to recover damages for wrongful death of plaintiff's intestate. Defendant, a corporation engaged in the business of manufacturing cotton goods, conducts a mercantile business in a store building located near its cotton mill, in Richmond County. In connection with said mercantile business, it owns and operates an ice and refrigerator plant located in a room adjacent to its said store building. The motive power for the operation of the machinery composing said plant is electricity, which is brought into the room over wires connected with the motors. The floor of the room is made of concrete, its walls of brick. Much of the machinery and apparatus used in the manufacture of ice, and in the operation of the plant, is composed of iron and other metals.

On 9 December, 1924, plaintiff's intestate, Eldridge Gibson, was employed by defendant as a clerk in its store. It was his duty also to look after and attend to the refrigerator plant in the room adjacent to the store building. During the morning of said day, in the course of his employment, and in the performance of his duties, Eldridge Gibson entered said room; the ice plant was not running at the time, but the air pump was being operated to keep the cold storage room, just over the plant, cool. It was his duty to go into the room about once every hour to see about the plant; soon after he entered said room, his dead body was discovered therein by other employees of defendant.

Plaintiff alleges that the death of her intestate was caused by electrocution after he went into the said room; that the machinery in said room had become charged with electricity as the result of careless and negligent construction of said plant and of the careless and negligent manner in which the electric wires had been installed therein; that the electric feed wires had been run into said refrigerating room in such manner that they touched the iron and metal of the machinery and that they were not grounded; that the result of this careless and negligent manner of installing the feed wires was that the whole current operating the plant passed through the ice carrier and other metal connections to the motors; that plaintiff's intestate, while in the room engaged in the performance of his duties, without warning of the dangerous conditions existing therein, came in contact with the said machinery so charged with electricity and was thereby instantly killed; defendant denies these allegations. By way of further answer and defense, defendant alleges that at the time of the death of plaintiff's intestate, he was at a place in defendant's refrigerating plant where he had no duty to perform for defendant and where defendant had no reason to apprehend or believe that he would be. Defendant further pleads contributory negligence and assumption of risk as defenses to plaintiff's action.

The issues answered by the jury are as follows:

1. Was the death of plaintiff's intestate caused by the negligence of the defendant as alleged in the complaint? Answer: Yes.

2. Did the plaintiff's intestate, by his own negligence, contribute to his injury and death, as alleged in the answer? Answer: No.

3. Did plaintiff's intestate assume the risk of his injury and death as alleged in the answer? Answer: No.

4. What damage, if any, is plaintiff entitled to recover? Answer: $7,500.00.

From the verdict upon this judgment, the defendant appealed to the Supreme Court.

W. R. Jones and Douglass & Douglass for plaintiff.
James A. Lockhart and Bynum & Henry for defendant.

CONNOR, J. Defendant, in its answer, admitted that plaintiff's intestate, on 9 December, 1924, in the course of his employment by defendant, entered defendant's refrigerating plant and was thereafter found dead in the northwest corner of said plant. The evidence, offered by plaintiff, is sufficient, if believed by the jury, to sustain the allegations of the complaint, that his death was caused by electrocution, resulting from his coming in contact, while in said plant, with machinery therein, which was charged with electricity of sufficient voltage to cause his death, and that said machinery was so charged as the result of negligence of defendant. C. E. D. Edgerton, found by the court to be an expert electrician, testified that the day after Eldridge Gibson's death, at the request of the president of the defendant corporation, he made an investigation of its refrigerating plant. He testified that the feed wire was not grounded; that the purpose of a grounded wire is to direct any stray current that might get on the pipe in which the wires were placed for safety, to the ground; that in his opinion, if the feed wire in the pipe had been grounded, the machinery would not have been charged with electricity; that if there had been a proper ground wire on the feed pipe, at the time of the breaking down of the wires, there would have been an explosion, which would have been a warning to a person in the room where the plant was located. This evidence was sufficient to establish the truth of the allegation that defendant was negligent in failing to have its wires properly installed in its plant.

The court, after correctly instructing the jury, in general terms as to the meaning in law of the terms "negligence," and "proximate cause," further gave the following specific instructions: "So applying this principle, gentlemen of the jury, to the first issue, the court charges you that if the plaintiff has satisfied you by the greater weight of the

evidence that the defendant, in the exercise of ordinary care failed to ground the wires where they entered the building at the southwest corner, and if the plaintiff has further satisfied you by the greater weight of the evidence that by reason of its failure to so ground its wires the defendant failed to provide the plaintiff's intestate with a reasonably safe place in which to perform his work, if the plaintiff has satisfied you by the greater weight of the evidence of these facts, then the court charges you that the defendant was guilty of negligence."

"And if the plaintiff has further satisfied you by the greater weight of the evidence that such negligence on the part of the defendant company was the proximate cause of the injury and death of plaintiff's intestate, then, gentlemen of the jury, the court charges you that it would be your duty to answer the first issue, 'Yes.' On the other hand, gentlemen of the jury, if the plaintiff has failed to satisfy you by the greater weight of the evidence of either of these facts, it would be your duty to answer the first issue, 'No.'" There was no exception to either of these instructions. They are clear, full and correct. There was evidence from which the jury could find facts upon which, under these instructions, it was their duty to answer the issue in the affirmative.

The court instructed the jury that the burden was upon defendant upon both the second and third issues, and that there being no evidence tending to sustain the affirmative of either issue, the jury should answer each issue "No." To these instructions defendant excepted, and assign same as error.

The defendant offered no evidence; we have examined the evidence offered by plaintiff, as set out in the case on appeal and concur with his Honor that there is no evidence from which the jury could find that plaintiff's intestate, by his own negligence, contributed to his injury, resulting in his death, or that plaintiff's intestate assumed the risk of his injury and death as alleged in the answer. No evidence was offered by defendant. The assignments of error cannot be sustained.

In its answer defendant alleges that, "at the time of the death of plaintiff's intestate, he was in a portion of the defendant's refrigerating plant where he had no duty to perform for the defendant and where the defendant had no reason to apprehend or believe that he would be, and that the place where his duties required him to be was a safe place, free from electric current, and had he remained in the place required in the performance of his duties, he would have received no injuries which could have caused his death, and if the death of plaintiff's intestate was caused by electric current, the sole and proximate cause of such death was, that though directed to go to the southeast portion of said plant, turn the switch, adjust the valves, and start the rotary pump, and then

return to his duties in the store, in all of which he would have been safe and uninjured, he negligently, carelessly and wrongfully went into a portion of the refrigerating plant where he had no duty to perform, and there, if he came into contact with an electric current and received injuries which caused his death, such fatal injury was due to the negligence and carelessness of the plaintiff's intestate himself."

The only evidence submitted to the jury as to the duties of deceased, as an employee of defendant, is the testimony of the witness Claud Miles. He testified that "Eldridge Gibson was a clerk in the store and watched after the ice plant. He was supposed to go about once an hour and see about the plant and work in the store, too. The ice plant was not running at this time, but they were running the air pumps and running enough to keep the cold storage room cold. They were not freezing any ice, but they had to keep the market cold." There was no evidence that deceased's duties were restricted as alleged by defendant, and no evidence that he was directed to go only to the southeast part of the room in which the plant was located. Nor is there evidence that he had no duty to perform at the place in the plant where he met his death. The evidence is that it was his duty to "watch after the plant"; defendant admitted that he entered the refrigerating plant in the course of his employment; it offered no evidence from which the jury could have found that it was not his duty to go to the northwest corner of the plant. The authorities cited in defendant's brief therefore have no application to the instant case. Defendant's assignments of error, based upon the exception to the refusal to allow the motion of nonsuit, at the close of plaintiff's evidence, and upon exceptions to the refusal to instruct the jury as requested, are predicated upon facts alleged in the answer; there was no evidence to sustain these allegations. The assignment of error cannot be sustained. We find no error; the judgment must be affirmed.

No error.

R. N. SMITH v. NANNIE L. SMITH.

(Filed 16 December, 1925.)

1. Pleadings—Demurrer—Cause of Action—Supreme Court—Courts.

Demurrer to the sufficiency of the allegations of the complaint to state a cause of action may be taken for the first time in the Supreme Court, or the court may dismiss the action *ex mero motu*, when proper, and in such instances for the demurrer to be good, the pleadings must be construed in the light most favorable to the plaintiff, and sustained if the cause of action is sufficiently alleged.

2. Banks and Banking—Deposit—Joint Accounts—Presumptions—Contracts—Judgments.

Where under a consent judgment moneys have been deposited in a bank to the joint account of husband and wife, as in other instances, it will be presumed, nothing else appearing, that each was to have an interest therein equal to the other.

3. Husband and Wife—Survivorship—Lands.

The right of survivorship existing between husband and wife applies only to real property.

4. Contracts—Consent Judgments — Pleadings — Demurrer—Banks and Banking—Deposits.

Where in an action between husband and wife a consent judgment has been entered decreeing that two thousand dollars on deposit in the bank should equally belong to each, with the covenant by the husband that he would sign with his wife, at her request, all deeds for the conveyance of her separate lands, upon the wife's drawing the full deposit, she may not thereafter maintain that the husband had breached his contract in failing to sign her deeds, and successfully resist his recovery of his half of the deposit upon the ground that the contract was indivisible, and he had failed to allege his ability, readiness, etc., to pay her a certain sum of money likewise incorporated in the judgment.

5. Contracts—Interpretation—Matters of Law—Courts.

Where an entire contract is in writing, its interpretation is a matter of law exclusively for the court.

APPEAL by defendant from *Schenck, J.*, and a jury, July Term, 1925, STOKES Superior Court. No error.

This was a civil action brought by plaintiff against the defendant to recover $1,000 and interest, under and by virtue of a covenant judgment between them, rendered at April Term, 1923, of the Superior Court of Stokes County.

The following was a provision agreed on in the judgment: "It is further ordered and adjudged by consent of the plaintiff and the defendant Nannie L. Smith, that the one-half of the money deposited in the Bank of Stokes County to the joint credit of the plaintiff and Nannie L. Smith, to wit, the sum of $2,000 be, and the same is hereby declared the property of the plaintiff R. N. Smith."

The defendant contends "that the plaintiff failed and refused to abide by the terms of the consent judgment and sign the deeds of the defendant when tendered him as he agreed to do, under terms contained in the consent judgment." Defendant set up a counterclaim and prayed that plaintiff take nothing by his action and that she recover of the plaintiff on her counterclaim the sum of $4,125.

At the conclusion of all the evidence in the case, the defendant took a voluntary nonsuit as to her counterclaim.

The issue submitted to the jury and its answer thereto was as follows: "What amount, if any, is the plaintiff entitled to recover of the defendant? The jury answered the issue in the sum of $1,000, with interest from 30 November, 1923."

The court below charged the jury as follows: "The court further charges you, gentlemen of the jury, that if you believe the evidence of the witnesses in this case, and find the facts to be as testified to by them, that you should answer the issue submitted, $1,000, with interest thereon from 30 November, 1923."

Defendant excepted and assigned error to the charge of the court and judgment as rendered and appealed to the Supreme Court.

Geo. L. Jarvis and Holton & Holton for plaintiff.
Chas. W. Stevens for defendant.

CLARKSON, J. In this Court the defendant asked leave to "demur *ore tenus* to the complaint filed by the plaintiff, in that by a reference to the said consent judgment, it will be noticed that the plaintiff, R. N. Smith, agreed to do certain things in consideration of the stipulations agreed to by defendant, Nannie L. Smith, and the complaint does not allege in any manner that the plaintiff, R. N. Smith, was ready, able and willing to perform his part of the said consent judgment."

Connor, J., in *Horney v. Mills,* 189 N. C., 727, lays down the rule as follows: " 'When a complaint does not state a cause of action, the defect is not waived by answering, and defendant may demur *ore tenus,* and the Supreme Court may take notice of the insufficiency, *ex mero motu.' Garrison v. Williams,* 150 N. C., 674. Upon this contention it is immaterial whether the answer filed is sufficient or not. The demurrer *ore tenus,* admits the truth of the facts alleged in the complaint. *Hayman v. Davis,* 182 N. C., 563. If the facts alleged in the complaint, admitted to be true, upon consideration of the demurrer, and construed liberally, with every reasonable intendment and presumption in favor of plaintiff, constitute a cause of action, in favor of plaintiff and against defendant, the demurrer must be overruled; otherwise the demurrer must be sustained." The present contract is set out and made a part of the complaint. The construction is a matter of law for the Court. *Snipes v. Monds, ante,* p. 191.

Defendant's position is that the covenants in the judgment were dependent; and the contract an entire one. Plaintiff contends the covenants were independent, divisible and severable.

The parties to this action admit, in reference to the clause of the judgment under consideration, that in the Bank of Stokes County was

deposited $2,000 to their joint credit. The agreement specifically says that "one-half is hereby declared the property of the plaintiff, R. N. Smith."

Under the law of this jurisdiction, nothing else appearing, the money to the joint credit in the bank belonged equally to plaintiff and defendant. In *Turlington v. Lucas,* 186 N. C., p. 290, it was held: "Where there is no evidence that there was an intention of a gift, on which many of the decisions are based, the fundamental of equal rights should prevail, and a division of equal shares adjudged." The right of survivorship recognized as now existing between husband and wife as to lands held by them in entirety, does not apply to personal property so held.

Defendant had no right to withdraw the $1,000 on deposit belonging to plaintiff. It was his money and the judgment she signed and agreed to declared the one-half of the $2,000 to be the property of plaintiff. In another clause of the judgment, it was agreed: "That if, at any time, the defendant Nannie L. Smith, desires to sell any of her separate land that the said R. N. Smith will execute a deed covering same, upon request of the defendant," etc. She testified: "I didn't pay the $1,000 as indicated in the agreement. The reason I didn't pay it, I did not have anything to pay it with. Another reason was he refused to sign my deeds. After he refused to sign the deeds I considered he broke the judgment and agreement." The agreement was broken when she took his money out of the bank—she cannot now take advantage of the wrong and ask a dismissal of the action because plaintiff did not allege that he was ready, able and willing to perform the part of the contract in reference to signing the deeds.

Plaintiff, after defendant had broken her covenant, testified: "I declined to sign any deed she sent over there until she made some preparations to pay the $1,000, and if she had done that, I would have signed any of them."

The deposit in the bank of $2,000 in the name of both, $1,000 belonged to plaintiff and the judgment declared it to be the property of plaintiff. The defendant might have waited for years before she sold any land and called upon plaintiff to make deeds. Can it be contended that the money under the agreement should stay in the bank until all the land was sold? She may have held the land and never sold it. Under the facts and circumstances of this case, we do not think the covenants of the judgment dependent. We think the court below was correct in the charge. All the other provisions of the judgment contract were executed. The above provisions were the only ones executory.

In *Allemong v. Augusta Nat. Bank,* 103 Va., Rep., p. 248, *Whittle, J.,* says: "This Court has said: 'Perhaps there is no other branch of the law in which is to be found a larger number of decisions or a greater

apparent conflict of authorities than that in which the effort has been made to define the dependence and independence of covenants, and to designate the class to which any given case in dispute is to be referred. The great effort, however, in the more recent decisions has been to discard, as far as possible, all rules of construction founded on nice and artificial reasoning, and to make the meaning and intention of the parties, collected from all parts of the instrument, rather than from a few technical expressions, the guide in determining the character and force of their respective undertakings.' Per *Daniel, J.*, in *Roach v. Dickinson,* 9 Gratt., 154. 'Courts construe agreements so as to prevent a failure of justice, and hold dependent covenants to be independent when the necessity of the case and the ends of justice require it, notwithstanding the form,' " citing cases. *Flour Mills v. Distributing Co.,* 171 N. C., p. 708.

Defendant's demurrer *ore tenus* cannot be sustained. We can find

No error.

STATE v. R. O. ABERNETHY.

(Filed 16 December, 1925.)

1. Municipal Corporations — Cities and Towns — Appeal — Certificate of Mayor—Statutes.

The certificate of the mayor of an ordinance the defendant has been convicted in his court of violating, required by C. S., 2637, is for the benefit of the solicitor in furnishing him ready information as to its existence and provisions, which also may be used in evidence upon the trial in the Superior Court on appeal, and under the provisions of C. S., 1750, it makes out a prima facie case of the existence of the ordinance when the statute is complied with.

2. Same—"Subscribed."

The certificate of the mayor of an ordinance the defendant in his court has been convicted of violating, to be used upon the trial in the Superior Court on appeal, is not required to be subscribed or sworn to, and under the facts in this case is *held* to be sufficient, it appearing that the certificate had not been subscribed, but sworn to before a notary public, and placed by the mayor in the case appealed from, C. S., 2637, 1750. This practice unfavorably commented upon by STACY, C. J.

3. Municipal Corporations — Cities and Towns — Statutes — "Fines"— Criminal Law—Punishment.

While formerly the "fine" imposed by a town for the violation of its ordinance is but a penalty which the town may collect by civil suit, (Const., sec. 14, Art. IV), the violation of the ordinance is now by statute made a misdemeanor and punishable as such, and a sentence of 30 days by the Superior Court on appeal is not an unlawful punishment.

STATE *v.* ABERNETHY.

APPEAL by defendant from *Stack, J.*, at April Special Term, 1925, of CATAWBA.

Criminal prosecution tried upon a warrant issued 2 June, 1924, charging the defendant with a violation of an ordinance of the city of Hickory, requiring every male resident in said city, between the ages of 18 and 45, to work upon the public roads and streets of said city four days in each year, except such persons as are relieved by the payment of a tax of $2.00 and who receive from the city manager a certificate of exemption to this effect. The alleged ordinance contains the following clause: "Every person who, after notice by a proper officer, shall fail to work the roads and streets as aforesaid shall be fined five dollars."

From an adverse verdict and judgment of 30 days in jail, *capias* not to issue upon certain stipulated conditions, the defendant appeals, assigning errors.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

R. O. Abernethy in propria persona.

STACY, C. J. This prosecution was commenced in the municipal court of the city of Hickory and tried *de novo* on appeal to the Superior Court of Catawba County. The defendant was adjudged guilty in the municipal court and ordered to pay a fine of $5.00. On appeal to the Superior Court he was again convicted and sentenced to 30 days in jail, but *capias* was ordered not to issue upon certain designated conditions, not material to the appeal. From the latter court, the case is brought to us for review.

Errors are assigned in two respects: 1. That the State failed to offer any sufficient proof of the existence of the ordinance alleged to have been violated. 2. That the judgment is erroneous in that it is in excess of the penalty fixed by the alleged ordinance.

First, with respect to the sufficiency of the proof of the ordinance: Over objection, the State was allowed to offer in evidence a copy of the ordinance alleged to have been violated, the same being among the papers in the case and accompanied by the following certificate or affidavit:

"North Carolina—Catawba County:

"I, S. L. Whitener, do hereby certify that I am the mayor of the city of Hickory, North Carolina, and that the above is a true and correct copy of an ordinance as it appears of record on the minutes of the city of Hickory of 18 May, 1922.

"Sworn to and subscribed before me this 10 April, 1925.

(Seal) A. H. ALEXANDER, N. P."

It is required by C. S., 2637, that, in all cases on appeal from a mayor's court to the Superior or other court of appeal, when the offense charged is a violation of a town ordinance, the mayor shall send with the papers in the case a true copy of the ordinance alleged to have been violated, "and shall certify under his hand and seal that said ordinance was in force at the time of the alleged violation of the same." It will be observed, from the certificate or affidavit, above set out, that it contains no certification by the mayor of the existence of the ordinance at the time of its alleged violation, 2 June, 1924. But this statute, imposing upon mayors the duty of certifying ordinances and sending them with the papers in all cases on appeal, is to be found in the Consolidated Statutes under the title of "Municipal Corporations." Its two-fold purpose would seem to be (1) for the benefit of the solicitor in furnishing him ready information as to the existence and provisions of the ordinance alleged to have been violated in any given case, and (2) to be used as evidence in the trial of the cause.

In the chapter on Evidence, C. S., 1750, is to be found the following provision: "In the trial of appeals from mayors' courts, when the offense charged is the violation of a town ordinance, a copy of the ordinance alleged to have been violated, certified by the mayor, shall be prima facie evidence of the existence of such ordinance."

The competency of the paper-writing as evidence, therefore, would seem to depend upon whether the alleged ordinance has been properly certified by the mayor. If so, it is prima facie evidence of the existence of the ordinance. Strictly speaking, a certificate by a public officer may be said to be a statement written and signed, but not necessarily nor usually sworn to, which is by law made evidence of the truth of the facts stated for all or for certain purposes. Cent. Dic. To certify means to vouch for a thing in writing, and C. S., 1750, does not prescribe any particular form of certification. *S. v. Schwin*, 65 Wis., 207. The form prescribed by C. S., 2637, would meet every requirement, but this is not exclusive nor the only method of certification. It is sufficient under C. S., 1750, if the ordinance be "certified by the mayor."

The failure of the mayor to sign the certificate at the bottom does not render it invalid, for the place of the signature is not material. It may be at the top, or in the body, of the instrument, as well as at the foot. *Burriss v. Starr*, 165 N. C., 657. "It is well settled in this State that when a signature is essential to the validity of an instrument, it is not necessary that the signature appear at the end, unless the statute uses the word 'subscribe.' *Richards v. Lumber Co.*, 158 N. C., 56; *Devereaux v. McMahon*, 108 N. C., 134; *Boger v. Lumber Co.*, 165 N. C., 557. Not only may the signature be anywhere, unless otherwise provided by statute, but it is also permissible, in the absence of an enactment con-

trolling the matter, for the maker either to sign the instrument by affixing his own signature, or to adopt a signature written for him by another. *Lee v. Parker*, 171 N. C., 144. Here, it may be assumed that the mayor authorized and adopted the signing of his name by the notary public, for he swore to it and caused the certificate, in its present form, to be placed with the papers in the case in compliance with the statute requiring that, in all cases on appeal from a mayor's court to the Superior Court, when the offense charged is a violation of a town ordinance, the mayor shall send with the papers in the case a true copy of the ordinance alleged to have been violated, and certify, under his hand and seal, that said ordinance was in force at the time of the alleged violation of the same.

While we hold the present certificate sufficient to warrant the introduction of the ordinance in evidence, the failure on the part of municipal authorities to comply with the provisions of C. S., 2637, is not to be commended, for the very good reason, *inter alia*, that it almost invariably leads to prolonged litigation, as witness the instant appeal.

Second, touching the alleged invalidity of the judgment: The defendant's exception to the judgment on the ground that it transcends the fine or penalty fixed by the ordinance, is not well taken and cannot be sustained. It is provided by C. S., 4174, that if any person shall violate an ordinance of a city or town, he shall be guilty of a misdemeanor, and shall be fined not exceeding fifty dollars, or imprisonment not exceeding thirty days. It is this statute which makes the violation of the present ordinance a misdemeanor, and not the ordinance itself. *S. v. Taylor*, 133 N. C., 755. Indeed, the five-dollar "fine," mentioned in the ordinance, is but the "fine" or "penalty" authorized by the city charter (chapter 68, Private Laws 1913) and the general statutes on the subject. C. S., 2673, 2635, 2636; *S. v. Crenshaw*, 94 N. C., 877; *S. v. Cainan, ibid.*, 880 and 883; *S. v. Holloman*, 139 N. C., 641; *S. v. Addington*, 143 N. C., 683; *S. v. R. R.*, 145 N. C., 495; *Milwaukee v. Ruplinger*, 145 N. W., (Wis.), 42; 8 R. C. L., 53.

Animadverting upon this subject in *School Directors v. Asheville*, 137 N. C., pp. 509, 510, *Mr. Justice H. G. Connor* said: "The town may, under its authority to make and enforce ordinances for its better government, enforce such ordinances by the imposition and collection of penalties. It has no power to impose fines, and although in many instances the word fine is used, it is but a penalty, to be recovered, as other penalties, by a civil action. Code, sec. 3804. Prior to the act of 1871, Code, sec. 3820, there was no other way provided for the enforcement of obedience to town ordinances; a violation of such ordinances was not a misdemeanor. *S. v. Parker*, 75 N. C., 249. In *Wilmington v. Davis*, 63 N. C., 582, it was held that the special courts authorized to be created

by the Legislature by section 14, Article IV, had no jurisdiction to try an action for the recovery of a penalty imposed for the violation of a town ordinance. The power of the mayor or other chief officer of a town to hear and determine a criminal action is derived from section 3818 of The Code, by which he is constituted an inferior court to be called a municipal court. He is made a magistrate and conservator of the peace, and within the corporate limits of any city or town given the jurisdiction of a justice of the peace in all criminal matters arising under the laws of the State, or under the ordinances of the town. In imposing fines for misdemeanors, whether committed by violating an ordinance or any other criminal law, he has the same power and jurisdiction as, and concurrent with, a justice of the peace in such town. It is therefore not accurate to say that fines imposed by him are for the enforcement of a town ordinance or punishment for the violation thereof; they are so only because by the criminal law the violation of a town ordinance is made a misdemeanor. The warrant runs against the form of the statute and the peace and dignity of the State. *S. v. Taylor,* 133 N. C., 755. It is held that a justice of the peace has concurrent jurisdiction of a charge of violating a town ordinance, because it is a misdemeanor. *S. v. Merritt,* 83 N. C., 677. A party violating a town ordinance may be prosecuted by the State for the misdemeanor and sued by the town for the penalty."

Of course, the State must show a valid ordinance or the prosecution necessarily fails. *S. v. Prevo,* 178 N. C., 740; *S. v. Snipes,* 161 N. C., 242.

The validity of the present ordinance is not seriously questioned, in the face of a charter provision and the general statute authorizing its adoption. C. S., 2675. It is substantially like the one set out in *S. v. Smith,* 103 N. C., 403.

The ordinance is valid; its violation is conceded; the defendant has been properly tried under the State law; the judgment is authorized by the statute; the verdict and judgment will be upheld.

No error.

CHARLIE BARNES AND ALEX BARNES, HIS WIFE, v. RUFUS CHERRY AND HANNA B. CHERRY, HIS WIFE, AND A. F. LEIGHTON AND FRANKIE J. LEIGHTON, HIS WIFE.

(Filed 16 December, 1925.)

1. Homestead—Judgments—Liens—Statutes.

The allotment of a homestead suspends the enforcement of all judgments during the continuance of the homestead interests. C. S., 728.

2. Same—Duration of Exemption — Widow — Children — Constitutional Law.

Where the owner of a homestead against which there are judgment liens dies leaving surviving a widow and minor children, the widow is not entitled, as against such liens, to a homestead in the lands of her deceased husband during the life of the child or children by the marriage, whether minors or adults, but if there are no children, the lands shall be exempt from execution during the lifetime of the widow. Const., of N. C., Art. X, secs. 3 and 5.

3. Same—Minor Children—Majority.

Where there are judgment liens against a deceased owner of lands leaving surviving a widow and children, a homestead therein laid off is exempt until the youngest child reaches the age of twenty-one, at which time the homestead right falls in, and not at the prior time of the death of the widow.

APPEAL by defendants from a judgment of *Sinclair, J.*, at June Term, 1925, of the Superior Court of EDGECOMBE County on an agreed statement of facts. C. S., sec. 626 *et seq.*

On 10 January, 1869, James W. Draughan acquired title to a tract of land containing 240 acres. Several judgments were recovered against him in each of the years 1876, 1877 and 1881, and one judgment in 1883. Executions were issued on the first five of the judgments recovered in 1876 and on 15 December, 1876, the judgment debtor's homestead was allotted in 110.2 acres, a part of the 240-acre tract, and on the record of these judgments is the entry, "No property to be found in excess of homestead and personal property exemption." James W. Draughan died in 1884, leaving surviving him his widow, S. H. Draughan and four children: Wallace Askew, Alex Barnes, Hanna B. Cherry, and Frankie J. Leighton. S. H. Draughan qualified as his administratrix and filed an account current on 1 February, 1885, but filed no final account. At the October Term, 1890, of the Superior Court, E. A. Draughan obtained a judgment against S. H. Draughan, administratrix of James W. Draughan, for $2,000, which was declared to be a lien on the homestead of James W. Draughan, subject to the rights of the children until the youngest arrived at the age of twenty-one. Frankie J. Leighton, the youngest child, became of age in 1906, and S. H. Draughan, the widow, died in 1924. The plaintiffs have contracted to convey their interest in the homestead tract to the defendants (who have agreed to pay therefor $100), and have tendered the defendants a deed with the usual covenants of warranty; but the defendants have refused to accept the deed and pay the purchase price, contending that the plaintiffs cannot convey a good and indefeasible title because the lien of the judgments has not expired.

Upon the agreed facts it was adjudged that the plaintiffs can convey a good title and are entitled to recover the purchase price with interest. The defendants excepted and appealed.

W. C. Douglass for the plaintiffs.
James Pender for the defendants.

ADAMS, J. Subject to certain exceptions the lien of a judgment docketed on the judgment docket of the Superior Court expires at the end of ten years from the rendition. C. S. 614; *Lytle v. Lytle,* 94 N. C., 683; *Barnes v. Fort,* 169 N. C., 431. When the judgment debtor's homestead is allotted, the allotment, as to all property therein embraced, suspends the running of the statute of limitations on all judgments against the homesteader during the continuance of the homestead. C. S., 728. It will be seen, then, that the appeal turns upon the question whether the lien of any of the judgments recovered against James W. Draughan or his administratrix has expired or whether it continues in effect so as to prevent the conveyance by the plaintiffs of an unencumbered title to their interest in the homestead. In the solution there is necessarily involved the further question whether the homestead right terminated in 1906, when the youngest child became of age, or in 1924, the date of the widow's death. If it terminated in 1906 the lien of the judgment has expired; if in 1924, it has not expired.

The answer to these questions may be found in the Court's interpretation of certain sections of the organic law relating to homesteads and exemptions. The Constitution provides that the homestead, after the death of the owner thereof, shall be exempt from the payment of any debt during the minority of his children, or any of them (Art. 10, sec. 3); and if the owner of a homestead die, leaving a widow but no children, the same shall be exempt from the debts of her husband, and the rents and profits thereof shall inure to her benefit during her widowhood, unless she be the owner of a homestead in her own right. Art. 10, sec. 5. In a number of our decisions these sections have been construed as meaning that a widow is not entitled to a homestead in the lands of her husband if he die leaving children, whether minors or adults; and these authorities are controlling in the present case. As the homestead right terminated in 1906, when the youngest child arrived at the age of twenty-one, the homestead is not subject to the lien of the judgments or of any of them. *Wharton v. Leggett,* 80 N. C., 169; *Gregory v. Ellis,* 86 N. C., 579; *Saylor v. Powell,* 90 N. C., 202; *Williams v. Whitaker,* 110 N. C., 393; *Formeyduval v. Rockwell,* 117 N. C., 320; *Simmons v. Respass,* 151 N. C., 5; *Fulp v. Brown,* 153 N. C., 531. The judgment is Affirmed.

WACHOVIA BANK & TRUST CO., EXECUTOR, v. W. L. MILLER.

(Filed 16 December, 1925.)

Appeal and Error—Case—Laches—Certiorari.

Where the appellant has pursued his right of appeal to the Supreme Court in accordance with the requirements in such cases, and through no laches or neglect of his, his case has not been docketed within the time required, upon his motion in the Supreme Court duly made and in apt time, a *certiorari* will be granted.

APPEAL by defendant from *Stack, J.*, at February Term, 1925, of BUNCOMBE.

Petition for *certiorari*, made by defendant at the present term of Court in order to preserve his right of appeal and to have the case heard in its regular order at the next succeeding term.

F. W. Thomas for defendant, petitioner.
Bourne, Parker & Jones for plaintiff, respondent.

STACY, C. J. This case was tried at the February Term, 1925, of Buncombe Superior Court, before his Honor, A. M. Stack, judge presiding, and from a judgment in favor of plaintiff, the defendant appealed. The appeal could have been heard under Rule 5 (185 N. C., 788) at the last term, but it was properly brought to the present term of the Supreme Court.

The judge, upon notice that counsel were unable to agree upon a statement of the case on appeal, set 13 April, 1925, as the time for settling the case before him. By consent, this was changed to 25 April. Counsel for both sides appeared before the judge and argued the exceptions filed by plaintiff to the defendant's statement of case on appeal. The judge allowed some of the exceptions, indicating his rulings by certain entries upon the margin of the exceptions, but his signature appears at no place thereon. It seems to have been the understanding that defendant's counsel was to redraft his statement of case on appeal, inserting plaintiff's exceptions as allowed by the judge. This he undertook to do, but the judge declined to approve it, thinking that he had signed the original statement on 25 April, when the plaintiff's exceptions were passed upon, and he was not certain as to whether the case, as redrafted, conformed to the rulings made at that time; hence he did not wish to sign a second statement of the case as he understood it. Thereupon, on 17 November, 1925, the judge addressed a letter to the clerk of the Superior Court of Buncombe County, directing him to insert the charge

and the entire evidence of one of the witnesses (after reducing it to narrative form) in the "Case on Appeal" as previously signed by him. The clerk certifies that he has never seen the case on appeal, as mentioned by the judge in his letter, and that none of the counsel in the case has been able to furnish him with it. It is agreed that this statement cannot be found.

On Tuesday, 8 December, 1925, upon the call of the docket from the 19th District to which the case belongs, defendant, appellant, moved for a *certiorari* in this Court so as to preserve his right of appeal, pending the final settlement of the case by the judge. It would seem that the defendant is entitled to the writ, for no case on appeal has been settled by the judge as required by C. S., 644, and we cannot say, from the record now before us, that appellant has lost his right of appeal by laches. Conceding that the judge may have signed the original statement of case on appeal, directing certain evidence and his charge to be inserted therein, as he thinks he did, still this was not a compliance with the provisions of the statute. *Gaither v. Carpenter,* 143 N. C., 240. Appellant is entitled to a writ of *certiorari* where his failure to perfect his appeal is due to some error or act of the court or its officers, and not to any fault or neglect of his own or that of his agent. *Winborne v. Byrd,* 92 N. C., 7; *Johnson v. Andrews,* 132 N. C., 380.

The judges of our Superior Courts have all found the task of settling cases on appeal quite exacting, and the means or assistance provided for such work noticeably deficient, nevertheless *ita lex scripta est.*

Let the writ issue, to the end that the case on appeal may be settled as the law directs.

Petition allowed.

WESTERN CAROLINA LUMBER CO. v. J. W. STURGILL.

(Filed 23 December, 1925.)

1. Appeal and Error—Harmless Error.

In order to set aside a judgment of the Superior Court on appeal, it must be made to appear that the error complained of was substantial, and worked an injustice on the appellant.

2. Contracts—Writing—Parol Agreements.

Parol evidence is not admissible to contradict, add to, take away from or vary the terms of a written contract, and all verbal contemporaneous declarations and understandings are incompetent therefor, as the parties are to be presumed to have incorporated in the writing the provisions by which they intended they should be bound in connection with the subject-matter.

3. Contracts—Fraud—Mistake.

Where a party to the written contract is able to read and understand it, and nothing is said or done by the other party to mislead him as to its meaning, he is bound by the writing he has thus signed, and it may not be set aside for fraud or mistake.

4. Same—Equity—Rescission—Cancellation.

In order to rescind or cancel a contract for fraudulent representations in its procurement, there must be a reasonable representation, express or implied, false within the knowledge of the party making it, reasonably relied on by the other party, and constituting a material inducement to the contract.

5. Contracts—Agreement as to Increase in Cost—Arbitration—Counterclaim.

Where a party to a written contract agrees to cut and deliver timber at a certain price, with provision that it was subject to be changed upon the increase of the price of labor or other conditions therein by agreement or by arbitration, and a higher price is accordingly subsequently fixed in the place of that first definitely specified, the party may not thereafter wait until the completion of his contract, and as defendant in an action upon the contract price successfully set up a counterclaim that under the terms of his contract he was entitled to more money for his services upon the ground that the price reached by arbitration was insufficient to cover an increase in the cost to him in the performance of his contract.

APPEAL by defendant from *Oglesby, J.,* and a jury, August Term, 1925, of YANCEY.

Civil action for the recovery of $4,406.82, under contract dated 8 July, 1922.

The material part of the contract in controversy is as follows: "It is understood and agreed by both parties that in case of radical changes in cost of operation that would warrant an increase or reduction in price herein stipulated that both parties are willing to negotiate and make such changes as may be warranted and agreed upon."

Plaintiff alleges: "That the defendant entered upon the fulfillment and performance of said contract and cut and delivered timber to this plaintiff until a time when he complained that he was not getting enough money to pay him for his work, and, under the contract hereinbefore referred to, demanded that negotiations looking toward the payment of a higher price for said cutting and logging said timber than that set forth in the contract should be paid him. Negotiations were accordingly had when it was agreed that the price per thousand should be advanced to $10.00, an increase of $1.50 per thousand, over and above the contract price. That the defendant, without any further demands, made upon the plaintiff, finished said contract, that is to say, finished cutting and delivering the timber mentioned in the said contract. That this plaintiff advanced the defendant, from time to time, sums of money and

at times largely in excess of the amount due him until on 1 March, 1924, the defendant owed this plaintiff the sum of $4,406.82, over and above all just demands, which the defendant has against the plaintiff, the same being overpayment for the said logging and delivering of said timber."

Defendant admits the contract, sets up fraud and mistakes, and alleges: "That the paper-writing involved in this cause, and as set out in the complaint was prepared by the defendant, and it was plainly understood and agreed that the written contract should encompass the terms agreed upon, and especially that part that bound the plaintiff to pay to the defendant the amount to be paid out on account of the rise in price of labor and production in general, if there should be such rise during the life and operation of the contract. That when it was written out, this defendant asked the representative of said plaintiff, who had in charge said contract, if the whole of the contract agreed upon was covered in said paper-writing, and he answered this defendant that it did, and especially did the plaintiff assure this defendant that the contract protected him against the rise of cost of production, labor, etc. That it was there agreed that this defendant should be protected against the rise of cost of production, and if the contract as so drawn and written fails to incorporate that provision, it does not set out in the same the complete contract, and has been left out of the same, either by mistake of the parties, mutual between them, or by the artful design, scheme, and fraud of the plaintiff, as he is advised and believes, and so alleges, and said contract should be so reformed as to speak the actual agreement and contract made between the parties. That following 8 July, 1922, this defendant in good faith proceeded to carry out this part of the contract; went upon the premises and proceeded to cut, log, etc., the logs to the landing as provided for in said contract; that he had not long been engaged in carrying out said contract until labor advanced, and this defendant proceeded to notify the plaintiff of the rise in wages, and the plaintiff from time to time, as wages advanced, advised this defendant to proceed, and procure labor at the advanced price, all in contemplation of the contract made between the parties, and each time that labor advanced the plaintiff was notified, and said plaintiff each time gave orders to procure labor at the advanced price, with the usual caution to get the labor as cheap as practicable, all of which this defendant did, all by the consent, procurement and advice of the plaintiff, and within the terms of the actual agreement between the parties. That it is true, that at one time, the plaintiff raised the price of cutting and logging, as required, to the sum of $10.00 per thousand feet, or a raise of $1.50 per thousand feet, all of which it did within the meaning of the contract and terms thereof, which bound it to

pay the additional cost of production; but, at the time of such raise, this defendant notified the plaintiff that such raise was insufficient to pay the additional costs of production, and that it would be held to the actual difference in costs occasioned by the raise of labor in price, and the costs of production. That it is not true that this defendant owes the plaintiff any sum, whatever, on account of said contract, or any advancements made by it, but the said plaintiff, by reason of said contract, is justly indebted unto the defendant by way of counterclaim, and as an additional recovery, in the sum of $8,870.30, and this is due the defendant after allowing the plaintiff all credits, set-offs, or just demands, including the said advancement of $4,406.82, sued for by the plaintiff in this action."

The issues submitted to the jury and their answers thereto, were as follows:

"1. What amount, if any, is the plaintiff entitled to recover of the defendant by reason of the matters and things alleged in the complaint? Answer: $4,406.82.

"2. What amount, if any, is the defendant entitled to recover of the plaintiff by reason of the matters and things set up in the counterclaim? Answer: Nothing."

Judgment was rendered on the verdict, exceptions and assignments of error were duly made, and appeal taken to the Supreme Court.

The material assignments of error will be considered in the opinion.

Watson, Hudgins, Watson & Fouts for plaintiff.
Charles Hutchins for defendant.

CLARKSON, J. Pursuant to order of the court, this case was referred to and heard before J. W. Ragland, Esq., referee. At the beginning of the hearing, and before hearing began, the defendant excepted to the trial before the referee and demanded a jury trial and tendered the issues before set forth. The referee, after hearing the evidence, gave judgment for plaintiff. Upon exceptions taken by the defendant, the case was tried in the Superior Court before a jury upon the issues tendered by defendant. The jury answered the issues in favor of plaintiff.

"Verdicts and judgments are not to be set aside for harmless error, or for mere error and no more. To accomplish this result, it must be made to appear not only that the ruling complained of is erroneous, but also that it is material and prejudicial, amounting to a denial of some substantial right. *In re Ross,* 182 N. C., 477; *Burris v. Litaker,* 181 N. C., 376." *Wilson v. Lumber Co.,* 186 N. C., 57; *Layton v. Godwin,* 186 N. C., 313; *S. v. Love,* 189 N. C., 774.

Smith, C. J., in *Ray v. Blackwell,* 94 N. C., 10, says: "It is a rule too firmly established in the law of evidence to need a reference to authority in its support; that parol evidence will not be heard to contradict, add to, take from or in any way vary the terms of a contract put in writing, and all contemporary declarations and understandings are incompetent for such purpose, for the reason that the parties, when they reduce their contract to writing, are presumed to have inserted in it all the provisions by which they intend to be bound. 1 Greenleaf on Evidence, sec. 76; *Ethridge v. Palin,* 72 N. C., 213." *Exum v. Lynch,* 188 N. C., 395; *Overall Co. v. Hollister Co.,* 186 N. C., 208.

The distinction between fraud in the *factum* and fraud in the treaty is ably discussed by *Stacy, C. J.,* in *Furst v. Merritt, ante,* 397. In the opinion various definitions of fraud are set forth. If defendant has sufficiently pleaded fraud, from the entire record, we do not think the evidence sufficient to establish it.

"Defendant could read and write. The contract was discussed by paragraphs with F. B. Duane and when agreed upon J. L. Henderson would write it on the typewriter. When finished, each were given a copy and defendant read it over before signing.

The common law affords to every one reasonable protection against fraud in dealing; but it does not go to the romantic length of giving indemnity against the consequences of indolence or folly or a careless indifference to the ordinary and accessible means of information." 2 Kemp Com., 485; Smith on the Law of Frauds, p. 110, note.

In the case of *Dellinger v. Gillespie,* 118 N. C., 737, Gillespie could read and write and he signed the contract but did not read it. This Court held: "It is plain that no deceit was practiced here. It was pure negligence in the defendant not to have read the contract. There it was before him, and there was no trick or device resorted to by the plaintiff to keep him from reading it." *Colt v. Turlington,* 184 N. C., 137; *Currie v. Malloy,* 185 N. C., 215; *Grace v. Strickland,* 188 N. C., 373; *Colt v. Kimball, ante.* 169; *Dunbar v. Tobacco Growers, ibid.,* 608.

The principle of rescission and cancellation by reason of fraud, as suggested in the pleadings, in order to constitute fraud of this class, the test is laid down in Adams Eq. (7 Am. Ed.), sec. 177: "There must be a representation, express or implied, false within the knowledge of the party making it, reasonably relied on by the other party, and constituting a material inducement to his contract or act."

Composing the answer to meet defendant's contentions, he alleges that the true understanding he had of the terms which specifically protected him against any rise in the price of production, a material part of the contract, and which bound it to pay to the defendant such difference in cost, was left out by the artful design, scheme and fraud of the plaintiff.

The defendant further alleges: "Such material part of the contract was left out by the design and procurement of the plaintiff, without the knowledge or consent of this defendant, and the plaintiff has thereby wrongfully and fraudulently, as defendant is advised and believes, taken advantage of the superior training, knowledge and education of its representative in dealing with this defendant, who has not had such training and education, and who is unskilled in the drawing of contracts, and who, by reason of his position, had to rely upon the plaintiff."

As before stated, defendant could read and write; the contract was read over by paragraphs and agreed upon; he read the contract before signing it. Nothing was concealed from him. The contract was typed—easy to read. Where is there any artful design or scheme, or fraud? If any material part was left out, he agreed to what was written, and it is too late now to complain. He should have refused to sign the contract at the time.

Smith on the Law of Frauds (1907), part sec. 77, says: "A purchaser of land cannot be allowed to shut his eyes either carelessly or wilfully and receive a conveyance of property without using the ordinary means and care that a business man of ordinary capacity would use under the circumstances, and then afterward claim that at the time the deed was executed he understood some other or different estate or interest was to be granted by the deed. To permit this practice would be to open the door to fraud. . . . The presumption of law is that a person of sound mind will exercise ordinary prudence in making contracts."

In *Newbern v. Newbern,* 178 N. C., p. 4, *Clark, C. J.,* said: "'In order to correct a deed which is absolute on its face, and to convert it into a security for debt, it must be alleged and proven that the clause of redemption was omitted by reason of ignorance, mistake, fraud, or undue influence,' and the intention must be established by proof, not merely of declarations, but of facts, *de hors* the deed, inconsistent with the idea of an absolute purchase. *Sowell v. Barrett,* 45 N. C., 50, citing *Streator v. Jones,* 10 N. C., 423; *Kelly v. Bryan,* 41 N. C., 283, and saying that 'otherwise, titles evidenced by solemn deeds would be at all times exposed to the *slippery memory of witnesses.*'"

In *Taylor v. Edmunds,* 176 N. C., p. 327, it was held: "It is true, as the defendant contends, the plaintiffs were educated men, and if they executed this deed merely by reason of their failure to read the same, they are bound by their voluntary act, and should not recover. *Dellinger v. Gillespie,* 118 N. C., 737. This is well-settled law, but the evidence in this case tended to show, and does show (as the jury find), that because of the confidential relationship existing between themselves and the defendant, covering a long course of dealings, during which they executed a large number of deeds sent them by Edmunds and Jerome

for lots sold by them, the plaintiffs had a right to assume that he would submit to them for execution deeds only for lands embraced in the contract, and that they were misled by the manner of submitting this deed to them for execution, sandwiched in with other deeds for property embraced in the contract of 22 March, 1912, and especially that they were misled by the false statement of the defendant's agent and co-grantee, W. G. Jerome, that 'these papers wind up that property.'" At p. 328 it is said: "The mere fact that a grantor who can read and write signs a deed does not necessarily conclude him from showing, as between himself and the grantee, that he was induced to sign by fraud on the part of the grantee, or that he was deceived and thrown off his guard by the grantee's false statements and assurances designedly made at the time and reasonably relied on by him."

Parol evidence will not be heard to contradict, add to, take from or in any way vary the terms of a written contract. The bargain made by defendant turned out to be a hard one, on account of the increase in the operation, hire of labor, etc. Defendant started to work under the terms of the contract. Radical changes in the cost of operations was the test of negotiations and agreement, under the contract, for increase or reduction. The increase that was made was by agreement and went into effect 1 April, 1923, advance of $1.50 over original contract making $10 per thousand fee. Defendant testified: "I demanded an increase before I got through because I needed it. I never demanded any more, but we frequently talked about the advance in wages: I thought at the end of the job was the place to make final settlement." We do not so construe the contract as to negotiating and agreeing. This should have been done as the radical changes took place in operation—like the agreement of raise 1 April, 1923.

From the view we take of the entire record, defendant's assignments of error cannot be sustained. They are not material from the construction we give to the contract. The court below, notwithstanding the fact defendant could read and write and knew fully what he was signing, and although no issue of fraud or mistake was tendered before the referee or in the Superior Court, allowed evidence to be introduced on these aspects, charged the jury clearly and ably on what constituted fraud and mistake, and gave the contentions of each side fairly and accurately. The court below, under the facts and circumstances of the case was more favorable to the defendant than he was, in law, entitled to under the contract. The jury found for the plaintiff.

From the entire record, we can find no prejudicial or reversible error.

No error.

W. N. DORSEY v. MRS. W. C. CORBETT AND HUSBAND, W. C. CORBETT, AND R. E. CAMPBELL AND B. T. FALLS, GARNISHEES.

(Filed 23 December, 1925.)

1. Pleadings—Amendments—Courts—Appeal and Error.

Amendments to the pleadings may be allowed by the trial judge that do not substantially change the cause of action, at the request of a party, or may do so *ex mero motu* to conform the pleadings to the evidence introduced under such circumstances; and where this discretion is not abused by him, his action therein is not reviewable on appeal.

2. Same—Principal and Agent—Sales—Commissions.

In an action to recover the amount of commissions alleged to be due an agent for the sale of lands, an amendment to conform the complaint to the evidence, that alleged the defendant was to pay this commission whether the property was sold either by the plaintiff, the owner, or another, did not substantially change the cause of action, and this allowance of amendment by the trial judge was not reversible error, but rested within his discretion.

3. Contracts—Married Women—Principal and Agent.

A married woman is *sui juris* under our law to make a valid contract with an agent for the sale of lands.

4. Instructions—Evidence—Appeal and Error.

An instruction that is not based on evidence permitted by the pleadings, is reversible error, when prejudicial to the appellant.

5. Pleadings—Amendments—Discretion of Court—Statutes.

With a view to substantial justice the allegations of a pleading will be liberally construed (C. S., 535); and where the trial judge may permit an amendment within his sound discretion allowed by statute, unless the complaining party show, to the satisfaction of the court, that he would be unlawfully prejudiced thereby, or where the variance is not material, the judge may direct the fact to be found according to the evidence, or may order an immediate amendment without cost. C. S., 552.

6. Contracts—Quantum Meruit—Evidence—Damages—Instructions.

In an action to recover compensation for the sale of land by an agent, the complaint alleged, and there was evidence tending to show and *per contra*, that defendant gave the sole agency therefor to the plaintiff, and that a commission of five per cent was to be paid him, and evidence of no fixed commission: *Held*, the plaintiff was entitled to his compensation if the defendant had sold the land to another, or through another agency, during the life of the contract, and an instruction upon the law relating to a recovery upon a *quantum meruit*, was not erroneous.

7. Same—Pleadings.

A recovery upon a *quantum meruit* will not be permitted where the declaration is upon a special contract with a special price therein stated as the standard; but such recovery is permissible where the allegations are based upon a contract upon commission and also when the amount is not fixed and is broad enough to include a recovery upon a *quantum meruit*.

APPEAL from *Shaw, J.*, and a jury, July Term, 1925, of CLEVELAND. No error.

At the time this action was commenced, an attachment was taken out, which the counsel for plaintiff and defendant admit was regular.

The plaintiff complains: "That sometime during the month of May, 1924, the plaintiff entered into a contract with the defendant, Mrs. W. C. Corbett, to act as her agent to sell that certain piece of property located in Shelby, North Carolina, known as Courtview Hotel property, said property being fully described in deed made by R. L. Ryburn, commissioner to Ella M. Corbett (Mrs. W. C. Corbett), which deed is of record in the office of register of deeds for Cleveland County, North Carolina, in Book of Deeds 3-P, page 12, reference to which record is hereby made for full description, and which description is made a part of this complaint, and that by the terms of said contract, the plaintiff was to receive 5% commission of the amount said property brought when same was sold, (whether by plaintiff, Mrs. W. C. Corbett, or by another person allowed by the court), the sale price to be $100,000, unless she agreed to take a smaller amount, but that said contract was later changed so as to authorize the plaintiff to sell said property at such price and terms as the plaintiff thought best. And that, in pursuance of the aforesaid contract, the plaintiff endeavored to sell said property and procured an offer of $80,000 from R. E. Campbell for same, and a request by G. C. King in behalf of the Cyclone Auction Company to submit an offer of $90,000 for same, and also a request from R. E. Campbell to give him a chance to raise any bid less than $100,000 for said property. That when the plaintiff thought he had the property about sold, he was notified by R. E. Campbell on the morning of 29 October, 1924, that said R. E. Campbell had purchased same through B. F. Falls, on the morning of 28 October, 1924, from the defendant, Mrs. W. C. Corbett; and that on the afternoon of 28 October, 1924, after the sale, and as the plaintiff is informed and believes, had been confirmed, the plaintiff received a long distance telephone call from the defendant, Mrs. W. C. Corbett, requesting him to state what offers he had had for said property, at which time this plaintiff stated the offer of R. E. Campbell, and stated to her that his commission would be 5%, to which she replied that she understood that to be the case. That the plaintiff is informed and believes that the said R. E. Campbell is to pay upon the delivery of a deed to him for the aforesaid property, the sum of $85,000, or more; and that under the terms of plaintiff's contract, as aforesaid, the defendants are justly indebted to the plaintiff in the sum of $4,250 or more," and prays judgment for that amount.

The defendant, Mrs. W. C. Corbett, denied the material allegations of the complaint, admitted that she received $85,000 for the property, but denies any indebtedness to plaintiff.

The issues submitted to the jury and their answers thereto were as follows:

"1. Is the defendant, Mrs. W. C. Corbett, indebted to the plaintiff, as alleged in the complaint, and, if so, in what amount? Answer: Yes, $2,125.00.

"2. Did R. E. Campbell, on 31 October, 1924, owe Mrs. W. C. Corbett anything, or have in his possession any property belonging to the said Mrs. W. C. Corbett, when notice of summons was served upon him, and if so, what amount? Answer: $4,300.00."

Judgment was rendered on the verdict. Numerous exceptions and assignments of error were taken by defendants to the admission of evidence, refusal to give special prayer for instructions, refusal to nonsuit and the charge of the court below, and an appeal taken to the Supreme Court.

The material assignments of error and necessary facts will be considered in the opinion.

D. Z. Newton and C. B. McBrayer for plaintiff.
B. T. Falls for defendants.

CLARKSON, J. We will not consider the assignments of error *seriatim*, and only the material ones.

The defendants complain that the court below allowed the plaintiff to amend his pleadings after all the evidence was in and the argument had begun. Plaintiff, in the complaint, alleged: "That by the terms of said contract, the plaintiff was to receive 5% commission of the amount said property brought when same was sold." The amendment allowed "whether by plaintiff, Mrs. W. C. Corbett, or by another person." Bearing on this, plaintiff testified: "I am a real-estate agent in the town of Shelby, and exhibit here my license for the years 1924 and 1925. Mrs. Ella M. Corbett and Mrs. W. C. Corbett are one and the same person. I had a contract with Mrs. Ella M. Corbett to sell her property known as the Courtview property in the town of Shelby, and was to receive 5% commission when the property was sold, if I sold it, or if she sold it, or if any one else sold it."

Amendment of pleading is in the sound discretion of the court below. This is not reviewable here unless there is an abuse of discretion. The amendment added no new cause of action. *Johnson v. Telegraph Co.*, 171 N. C., 130; *R. R. v. Dill*, 171 N. C., 176; *Talley v. Granite Quarries Co.*, 174 N. C., 445; *Brewer v. Ring and Valk*, 177 N. C., 485.

It was said in *Sams v. Cochran*, 188 N. C., p. 733: "Under our liberal practice, the court below, in its sound discretion, in furtherance of justice, can amend the pleading, before and after judgment, to con-

form to the facts proved, keeping in mind always that an amendment cannot change substantially the nature of the action or defense without consent. Our system is broadening and expanding more and more, with the view at all times that a trial should be had on the merits and to prevent injustice." C. S., 547.

We think the complaint fully sets forth a cause of action.

"Where a broker, authorized to sell at private sale, has commenced a negotiation, the owner cannot, pending the negotiation, take it into his own hands and complete it, either at or below the price limited, and then refuse to pay the commission." *Keys v. Johnson,* 68 Penn., p. 42; *Martin v. Holly,* 104 N. C., 39; *Trust Co. v. Goode,* 164 N. C., 19.

From the testimony of plaintiff there was a binding contract: "When the property was sold, if I sold it, or if she sold it, or if any one else sold it." Mrs. Corbett was *sui juris,* under our law, and had the legal right to make such a contract. She denied plaintiff's version of the contract. This was a question for the jury. The court below properly refused to grant her motion for judgment as in case of nonsuit at the close of plaintiff's evidence and at the close of all the evidence. C. S., 567; *Fleming v. Holleman, ante,* 449.

The assignment of error most earnestly pressed before us by the able counsel for defendants, was the charge of the court below as follows: "Now the defendant, Mrs. Corbett, asks you to answer this issue 'Nothing.' She says she had put this property in the hands of Mr. Dorsey, but there was no agreement as to amount of commission she was to pay, and she had right in law to make this kind of contract, if that contract was made. If that was the agreement between herself and Mr. Dorsey and the agreement further was she was to pay him whether he sold the property, or she sold it, or some one else sold it under her direction, then she would be indebted to him, nothing else appearing, to what the service was reasonably worth, or what was the customary charge of real estate agents in this community and territory for making sale of property. In other words, the law would imply a contract on her part whether it was specified or not to be paid what the services were reasonably worth, or the customary charge by real estate agents in this part of the country."

The defendant says: "It is respectfully submitted that no witness testified to any such statement of facts or any statement of facts from which the foregoing could be inferred. Plaintiff emphatically alleges and testifies to the contract of 5% absolutely due upon sale of property. The defendant testifies that she placed the property with him for sale without stipulated commission."

An instruction about a material matter which is not based on sufficient evidence, is erroneous. *Williams v. Harris,* 137 N. C., 460; *Smith v. R. R.,* 174 N. C., 111.

C. S., 535, is as follows: "In the construction of a pleading for the purpose of determining its effect its allegations shall be liberally construed with a view to substantial justice between the parties."

C. S., 552 is as follows: "1. No variance between the allegation in a pleading and the proof shall be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action upon the merits. Whenever it is alleged that a party has been so misled, that fact, and in what respect he has been misled must be proved to the satisfaction of the court; and thereupon the judge may order the pleading to be amended upon such terms as shall be just. 2. Where the variance is not material as herein provided, the judge may direct the fact to be found according to the evidence, or may order an immediate amendment without costs."

Mrs. W. C. Corbett, the defendant, testified: "She authorized W. N. Dorsey to use his best efforts to sell said property, no commission was mentioned. . . . I wrote him to sell it at any price rather than to be foreclosed." Plaintiff performed services in negotiating a large loan, some $48,000. True, she said she paid him just before she left Shelby in July. "He told me he ought to be paid something further for his services, and I asked him what amount, and he finally wrote $1,000, and I paid him at that time $500, which he accepted, and with which he seemed to be satisfied. I listed the property with him for sale as well as others, but at no time gave him exclusive agency."

The price that she was asking for the property was $90,000. Her evidence shows that plaintiff had an offer from R. E. Campbell for $80,000, he submitted the offer to her less his 5% commission. Without revoking the agency, she negotiated the sale through another in Shelby and closed at $85,000, to the same party—R. E. Campbell—and made a deed to him. Campbell in his testimony stated that another than Dorsey "was the first to begin negotiations" and through whom he closed the deal and obtained the deed.

C. C. Blanton testified: "That Mrs. Corbett said that he (W. N. Dorsey) was her agent and would get the commission anyway, that he had all the business to attend to, renting, selling and everything, that when it was sold Mr. Dorsey would get his commission out of it.

Q. State whether or not she stated the amount of commission he would get? Answer: I don't think so. I don't remember whether he stated that or whether she did; something was said about 5%, but I don't remember which one said it. I believe both told me that, but I am not positive.

Q. State whether or not she stated that Mr. Dorsey was her sole agent? Answer: Yes, she did. She said that on several occasions, her sole agent, and that is when she spoke of paying him 5%.

Q. State whether or not she had reference to the sale of the Courtview Hotel property when she stated that he was her sole agent. Answer: Yes, that is what she was talking about.

Q. State whether or not she made any statement about whether he would get the commission if he sold it, or if she sold it, or whoever sold it? Answer: Yes, she said that if she sold it Mr. Dorsey would get the commission and she said: 'He is my sole agent and has done a great deal for me and I will expect him to have the commission out of the sale of the property.' "

We think from the evidence the charge was fully warranted. The jury gave the plaintiff less than he was suing for, taking the evidence of others than plaintiff on a *quantum meruit* basis. We cannot see any prejudicial error, the amount being far less than that sued for.

Mordecai's Law Lectures, vol. 1 (2 ed.), p. 127, says: "Under the old practice the plaintiff generally declared upon the special contract and added also what were called the common counts, so that if he failed on the special contract he could have relief in *assumpsit;* and now under The Code a party may recover on a *quantum meruit,* although the complaint is on the special contract; or the plaintiff may so frame his complaint as to declare both on the special contract and in *quantum meruit;* or the complaint may state the cause of action so broadly as to authorize a recovery of either on a *quantum meruit* or on the special contract. This, however, is a slovenly mode of pleading, tolerated, but not approved, as the cases cited will show."

There are cases where this principle would not apply. When the recovery is restricted by the special contract, and the price agreed upon in the special contract is the standard, the special contract "must of necessity guide the jury." Mordecai's Law Lectures, *supra,* p. 128; *Markham v. Markham,* 110 N. C., p. 362; *Reams v. Wilson,* 147 N. C., 304.

In the case at bar, the evidence showed the special contract was not the only standard of recovery, but the evidence, on the entire record, was sufficient to be submitted to the jury, as to *quantum meruit.* The able judge who tried the case, with more than ordinary care, gave in his charge the law as it applied to the different phases of evidence. We see no reason for the defendants to complain under the facts and circumstances of this case, reviewing the whole evidence as the court did below, and as we now do, in a judicial and nonpartisan view.

From the entire record, we can find no prejudicial or reversible error.

No error.

RONALD GREENE v. L. B. JACKSON.

(Filed 23 December, 1925.)

1. **Contracts—Agreement—Offer and Acceptance.**

A valid contract is the agreeing together of the minds of the parties upon the subject-matter thereof, and where it is evidenced by a proposal and acceptance contained in a correspondence thereon, the acceptance must be unconditional.

2. **Same — Letter — Correspondence — Leases — Cost of Construction of Building.**

Where a contract by correspondence for the renting of a certain floor of an office building to be erected, between the owner and his architect, the latter proposing to lease the offices of this floor at a certain per cent of the cost to the owner, the contractor to specifically name the cost thereof in his contract for the erection of the building, and later the owner writes that it was found to be impossible to arrive at the cost of this floor as agreed upon, but that they could doubtfully arrive thereat from the cost of materials and that of construction, a reply that the architect agreed to the proposition and would have to see the bill for materials, labor, etc., is an unconditional acceptance, the provision therein relating only as to the method necessary for him to ascertain the cost is immaterial.

3. **Demurrer—Pleadings.**

Upon demurrer to the sufficiency of the allegations of the complaint to state a cause of action, the allegations are taken as admitted.

APPEAL from *Oglesby, J.*, at July Term, 1925, of BUNCOMBE. Error.

The plaintiff alleges: "That on or about 21 December, 1922, the defendant entered into an agreement with the plaintiff whereby the said defendant was to lease to the plaintiff the thirteenth story of a certain building, which defendant was to erect on the south side of Pack Square, in the city of Asheville, county and State aforesaid, said lease to run for a period of five years from the date of the completion of said building; that the consideration for said lease, according to said agreement, was to be a yearly rental equal to 16% of the cost of erecting the thirteenth story of said building, provided that said annual rental should not exceed 16% of $5,000, which for the purpose of fixing said rental was stipulated as the maximum cost of erecting said thirteenth story; that said contract and agreement between the plaintiff and defendant was reduced to writing and it is embodied in a certain letter of the date of 21 December, 1922, from the defendant to the plaintiff, and a certain letter from the plaintiff, of the date of 23 December, 1922, to the defendant, and pursuant to the agreement made between plaintiff

and defendant, the letters referred to, and the design of plaintiff of said thirteenth story, and the written specifications prepared by plaintiff for said building in accordance with said design and which were adopted and used by defendant in procuring bids for the erection of same, including said thirteenth floor, and in which said specifications is the following provision relating to said thirteenth floor:

" 'The office space and promenade are to be the future office space of the architect for the building. As his lease is based on percentage of the cost of the space, each contractor is requested in his bid to show a separate amount for the construction of the architect offices, which will be in addition to the construction required if this portion of the building were not to be built. Allow one-third (⅓) of cost of metal, lumber, roof construction, and deduct cost of five (5) ply composition Johns Manville 20-year roofing over area considered in this estimate. This bid shall not include any wood paneling, wall decoration, travertino floors, wall finish, ornamental plaster, ornamental truss or other woodwork, or metal facing. In general, construction work within area marked in crayon on blue print shall be included in this estimate.'

"And the defendant awarded a contract for the construction of said building and said thirteenth floor according to said design, plans and specifications so prepared and furnished by plaintiff to defendant and including the aforesaid provision, and the defendant prosecuted the work of constructing said Jackson Building and said thirteenth floor to completion in substantial accordance with said design, plans and specifications of plaintiff, and on or about 26 June, 1924, when said thirteenth floor was practically completed, the defendant further duly ratified the contract so entered into between him and the plaintiff by letter dated on that day. That said contemplated building was erected by the defendant, L. B. Jackson, and is now fully completed, and said thirteenth story so agreed to be leased by the defendant to the plaintiff as aforesaid, was constructed for the occupancy of the plaintiff pursuant to said agreement according to the plan and design agreed upon, so that said thirteenth story could be occupied by the plaintiff as a studio, or as offices in connection with plaintiff's practice as an architect. That upon the completion of said building and of said thirteenth story thereof, the plaintiff requested the defendant to execute a lease and deliver possession of said thirteenth story of said premises, according to the contract and agreement hereinbefore mentioned; but the defendant, in violation of his contract and agreement as aforesaid, failed and refused to execute said lease and deliver possession of said premises." Plaintiff alleges damage.

The letters are as follows:

Mr. Ronald Greene, Asheville, N. C., 21 December, 1922.
Asheville, N. C.

Dear Sir:

Confirming verbal conversation I agree to erect for you on the roof of my new office building which I am going to erect on South Pack Square a studio for your offices. Said studio not to cost me over five thousand dollars, and you to take same on a five-year lease at 16% yearly of the cost you to erect same.

Yours very truly, L. B. JACKSON.

Mr. L. B. Jackson, 23 December, 1922.
Asheville, North Carolina.

Dear Sir:

I hereby accept your proposal to erect on the roof of your office building to be erected on South Pack Square, a studio for my offices according to my design, the cost of which shall not exceed five thousand dollars ($5,000), with the understanding that I shall have full access to the accounts and methods of determining said cost; and I further agree to lease this addition at the rate of 16% yearly of the cost to you to erect same. Yours very truly, RONALD GREENE.

Mr. Ronald Greene, Asheville, N. C., 26 June, 1924.
Asheville, N. C.

Dear Sir:

Mr. L. L. Merchant has just showed me a letter which you wrote him, dated 24 June, in which you requested that he furnish you with a detailed statement of the cost of 13th floor, which you are to occupy. It has been absolutely impossible for the foreman to keep the cost of this floor separate as the men have been working back and forth in such a way that no one could keep the labor and material separate. I would suggest that we have Mr. Merchant and some other reliable contractor to estimate the labor and material used on this floor, and in this manner you and I can arrive at what would be a fair and reasonable basis. I feel sure that we will have no trouble in getting together for I know that I do not want anything but what is right, and I feel sure that this is the way you feel about it.

Yours very truly, L. B. JACKSON.

The court rendered the following judgment: "This cause coming on to be heard before his Honor, John M. Oglesby, judge presiding, and a jury, and being heard, and after the selection and empaneling of the jury

and the reading of the pleadings, the defendant entered a demurrer *ore tenus* and moved to dismiss the action on the ground that the complaint failed to state a cause of action, and pending consideration of said demurrer and upon intimation that the court would sustain the demurrer, the plaintiff asked to be permitted to file an amended complaint, which was allowed over defendant's objection, and after said amended complaint was so filed by the plaintiff and defendant again demurred *ore tenus* and moved to dismiss the action, because the complaint as amended fails to state a cause of action, and the court being of the opinion that neither the complaint nor the amended complaint states a cause of action, and that the action should be dismissed; it is therefore, upon motion of counsel for the defendant, ordered and adjudged that this action be, and the same is hereby dismissed, and that the plaintiff pay the costs to be taxed by the court." Plaintiff excepted to the judgment, assigned error and appealed to the Supreme Court.

Carter, Shuford, Hartshorn & Hughes and Mark W. Brown for plaintiff.

Lee, Ford & Coxe for defendant.

CLARKSON, J. Plaintiff was the architect for what is known as the "Jackson Building." The correspondence in the record was between the plaintiff, architect, and the defendant, the then owner of the land on which the building was built and now president of Asheville Investment Company, a corporation, that now owns the building. Defendant made a motion *ore tenus* and moved to dismiss the action on the ground that the complaint failed to state a cause of action. *Pridgen v. Pridgen*, *ante*, 102; *Snipes v. Monds*, *ibid.*, 190; *Smith v. Smith*, *ibid.*, 764.

This brings us to consider the only question in the case: Was there a binding contract between plaintiff and defendant? "A contract is the agreement of two minds—the coming together of two minds on a thing done or to be done." *Overall Co. v. Holmes*, 186 N. C., 431.

We think the construction given by defendant of the contract, with relation to the parties, too narrow. The contract should be construed, taking into consideration all three of the letters and the building contract in reference to the 13th floor—the studio. Letter from Jackson to Greene, 21 December, 1922: (1) offer to erect a studio for Greene in new "Jackson Building," (2) not to cost Jackson over $5,000, Greene to have 5 year lease at 16% yearly of the cost you to erect same. Letter, Greene to Jackson, 23 December, 1922: I hereby accept your proposal to erect studio for my offices—my design—cost shall not exceed $5,000. Understanding to have access to accounts to determine cost. Further, the lease at rate of 16% yearly of the cost to you to erect same. "You

to erect same" in Jackson's letter, as we understand it, is same as "according to my design" in Greene's letter. In these two letters the only immaterial difference in the offer and acceptance is access to accounts to determine cost.

In procuring bids for the erection of the studio, defendant took the bids on the design, plan and specifications drawn by plaintiff, Greene, as follows: "The office space and promenade are to be the future office space of the architect (Greene) for the building. As his lease is based on percentage of the cost of the space, each contractor is requested in his bid to show a separate amount for the construction of the architect offices, which will be in addition to the construction required if this portion of the building were not to be built," etc. Nothing was said in the plans as to cost limit—contractor to keep separate amount for construction as lease is based on this cost.

The building was erected in accordance with plaintiff Greene's design, plan and specifications, and agreed to by defendant, who was the owner and gave the contract out according to agreed plans. In this architect's plan, if there had been any question from the letters, Jackson accepted (1) the design and (2) the lease—"future office space of the architect." The letter of Greene to Jackson says "yearly," showing acceptance of lease was for five years. The "Jackson Building" was completed about 26 June, 1924, and the "studio" built in compliance with the design of the architect's plan agreed upon by owner, Jackson. The "studio" was ready for occupancy by plaintiff, no disagreement up to this time as to any of the terms. In corroboration of this view, Jackson wrote Greene that, according to his (Greene's) request, it was absolutely impossible to keep cost of floor separate, could not keep the labor and material separate. Under the Greene letter to Jackson, in reference to this cost put in the plan of the "studio" and agreed upon to "show a separate amount for the construction of the architect offices," plaintiff was entitled to "full access to the accounts," etc., to estimate rate of 16%.

This is the liberal view we take of the dealing of plaintiff and defendant in relation to the writings, the language, the purpose, each party's relationship to the building of the studio (one the architect and the other the owner). With the immaterial matters, the cobwebs, removed, taking the entire transaction into consideration, we think they came to an understanding—their minds met and there was a binding contract between them. Plaintiff, under the contract, had the right of access to the accounts to estimate the cost as a basis of yearly rental.

In *Cozart v. Herndon,* 114 N. C., 254, *Shepherd, C. J.,* says: "It is well settled that in order to constitute a contract there must be a 'proposal squarely assented to.' If the proposal be assented to with a qualification, the qualification must go back to the proposer for his

adoption, amendment or rejection. If the acceptance be not unqualified, or go to the actual thing proposed, then there is no binding contract. A proposal to accept or acceptance based upon terms varying from those offered is a rejection of the offer. 1 Wharton on Con., 4. 'The respondent is at liberty to accept wholly, or reject wholly, but one of these things he must do; for if he answer not rejecting, but proposing to accept under some modification, this is a rejection of the offer.' 1 Parson on Con., 476. 'It amounts to a counter-proposal, and this must be accepted and its acceptance communicated to the proposer, otherwise there is no contract.' Pollock on Con., 10." *Golding v. Foster,* 188 N. C., p. 216; *Overall Co. v. Holmes, supra; May v. Menzies,* 184 N. C., 152; *Green v. Grocery Co.,* 153 N. C., 409. We think the construction we give fully meets the requirements of the law so clearly set forth in the above decision of *Chief Justice Shepherd.*

The letter of 26 June, of Jackson to Greene, says: "I feel sure that we will have no trouble in getting together for I know that I do not want anything but what is right, and I feel sure that this is the way you feel about it." Get together on what? "Detailed statement of the cost of the 13th floor *which you are to occupy"?* Everything else was agreed and settled upon.

The demurrer *ore tenus* admits the truth of the facts alleged in the complaint. *Smith v. Smith, supra.*

From the view we take, the demurrer is overruled.

Error.

FLORENCE E. BOYD v. BRISTOL TYPEWRITER COMPANY.

(Filed 23 December, 1925.)

1. Deeds and Conveyances—Registration—Trusts—Mortgages—Liens—Judgments—Priorities—Statutes.

Where a deed of trust to secure certain bonds upon the lands has been duly registered, and contains the provisions that the lands may be sold in part by the trustor, and with the consent of the trustee who is to receive the purchase price and apply on the bonds secured by the instrument, one who has purchased a part of the lands and paid part of the purchase price to the trustee who has paid it on the secured bond but has not joined in the deed by trustor and the trust deed is uncanceled of record, the docketing of a judgment against the trustor before the party to whom trustor conveyed part of land without consent in writing of trustee—purchaser who paid the purchase price, is entitled to the relief sought in his suit, to have the judgment canceled to the extent that it is a cloud upon the title to his land thus conveyed to him. C. S., 614.

2. Same—Title.

Where lands are conveyed to a trustee to secure mortgage notes thereon, with provision that with the consent of the trustee the lands may be sold in parcels and the proceeds applied to the mortgage notes: *Held*, the title remains in the trustee subject to the provisions in the deed, and the legal title remains in him under the trusts imposed by the instrument.

3. Same—Parties—Judgments.

Where there is a compliance with the conditions by the *cestui que trust* in the trust deed, the trustee, a party to the suit to remove the lien of a judgment as a cloud upon the title to lands, will be decreed when this remedy is appropriate.

APPEAL from *Stack, J.*, May Term, 1925, CALDWELL Superior Court, dissolving a restraining order. Reversed.

The parties agreed that the court below should find the facts, which are as follows: "That on 12 October, 1918, W. S. Whiting and wife executed a deed of trust to G. M. Sudderth, trustee to secure B. B. Dougherty and five others against any loss which they might sustain as accommodation endorsers on five promissory notes of $5,000 each bearing even date with the deed of trust, and being due and payable 12 February, 1919, said deed of trust being on two tracts of land; first tract containing 764 acres and second tract containing 1,002 acres, and that the average value of said land was $25.00 per acre. That said deed of trust was filed for registration 13 November, 1918, and is recorded in Watauga County in record of mortgages, marked 'W,' on pages 115 and 119 inclusive. That said deed of trust contains the following clause: 'Provided, that as said land is sold from time to time, with approval of said trustee, the proceeds shall be applied pro rata to the payment of said notes and the accrued interest thereon.' That none of the endorsers secured by said deed of trust ever paid out anything by reason of their said endorsement, and that the said indebtedness has been fully paid and satisfied. That the plaintiff, Florence E. Boyd, purchased a portion of the lands described in said deed of trust from W. S. Whiting and wife, a deed calling for 260⅓ acres at the price of $25.00 per acre. And W. S. Whiting and wife, Caroline L. Whiting, on 13 September, 1919, executed a deed to the plaintiff for said land, which was placed in escrow with G. M. Sudderth, trustee, to be delivered when the purchase price was paid, but she did not file the same for registration in Watauga County until 22 November, 1922, at which time it was filed for registration, and was registered in Book 30, page 261, and said deed was also filed for registration in Caldwell County on 12 July, 1923, and is recorded in Book 103, page 524. G. M. Sudderth did not join in said deed and the same was not sold by him under the power contained in the deed of trust, but the money paid to Sudderth, trustee, by Miss Boyd was

paid over by Sudderth on the notes secured by the deed in trust to him. That the defendant, Bristol Typewriter Company, obtained a judgment against W. S. Whiting, which was docketed 13 November, 1922, in the office of the clerk of the Superior Court of Watauga County, in Judgment Docket No. 3, page 47, the judgment being for the sum of $328.85, and with interest thereon from 1 September, 1921, and the costs. That the land covered by plaintiff's deed is located in Watauga County. That the plaintiff paid $1,000 cash, and paid $2,000 more, making a total of $3,000, on said purchase price before the registration of her deed and before the said judgment of defendant was docketed in the Superior Court of Watauga County, and she has paid the remaining $3,833.33 since the registration of her deed and since the docketing of the said judgment of the defendant against W. S. Whiting in Watauga County. That this plaintiff issued a summons in Caldwell Superior Court on 28 July, 1923, against W. S. Whiting and wife, Caroline Whiting, and G. M. Sudderth and Watauga County Bank, in which action there were two judgments rendered, one at August Term, 1923, and the other at November Term, 1923, as said judgments appear of record, which should be included in these findings of fact, but the defendant, Bristol Typewriter Company, was no party to said action. That W. S. Whiting was adjudged a bankrupt in the year 1924."

"Upon the foregoing facts I conclude that the plaintiff is not entitled to restrain the defendant from proceeding to sell the property embraced in her deed and that said judgment constitutes a valid lien against her land. It is, therefore, ordered and adjudged that the restraining order heretofore granted be dissolved; that the plaintiff is not entitled to recover and is not entitled to have the defendant's judgment canceled as a cloud upon the plaintiff's title; that said judgment is a valid lien against the property described in the deed from W. S. Whiting and wife to the plaintiff, and the sheriff is directed to proceed with the sale thereof for the purpose of satisfying the defendant's execution, and the plaintiff is adjudged to pay the cost of this action to be taxed by the clerk."

The attorneys, after the findings of Judge Stack, agreed as follows:

"In this cause it is stipulated and agreed: (1) The deed of trust of Whiting and wife to Sudderth, trustee, dated 12 October, 1918, referred to in the pleadings and findings of the court, was at the date of the institution of this action and now is uncanceled of record. (2) The sale of lands to plaintiff by Whiting and wife was with the approval of George M. Sudderth, trustee."

The plaintiff excepted, made the following assignments of error, and appealed to the Supreme Court:

"1. The error of the court in the conclusion that the plaintiff is not entitled to restrain the defendant from proceeding to sell the property embraced in her deed and that said judgment constitutes a valid lien against her land.

"2. The error in adjudging that the restraining order theretofore granted be dissolved:

"3. The error in adjudging that the plaintiff is not entitled to recover and is not entitled to have the defendant's judgment canceled as a cloud upon plaintiff's title.

"4. The error in adjudging that the said judgment is a valid lien against the property described in the deed from W. S. Whiting and wife to the plaintiff, and the sheriff is directed to proceed with the sale thereof for the purpose of satisfying the defendant's execution, and the plaintiff is adjudged to pay the cost of this action to be taxed by the clerk.

"5. The judgment rendered by the court."

Squires & Whisnant for plaintiff.
V. B. Bowers and Hayes & Jones for defendant.

CLARKSON, J. One of the most important acts ever enacted to quiet titles is known as the "Connor Act," passed in 1885, C. S., 3309, in part, is as follows: "No conveyance of land, or contract to convey, or lease of land for more than three years shall be valid to pass any property, as against creditors or purchasers for a valuable consideration, from the donor, bargainor or lessor, but from the registration thereof within the county where the land lies," etc.

C. S., 3311, is as follows: "No deed of trust or mortgage for real or personal estate shall be valid at law to pass any property as against creditors or purchasers for a valuable consideration from the donor, bargainor or mortgagor, but from the registration of such deed of trust or mortgage in the county where the land lies; or in case of personal estate, where the donor, bargainor or mortgagor resides; or in case the donor, bargainor or mortgagor resides out of the State, then in the county where the said personal estate, or some part of the same, is situated; or in case of choses in action, where the donee, bargainee or mortgagee resides. For the purposes mentioned in this section the principal place of business of a domestic corporation is its residence."

C. S., 614, in part, is as follows: "Upon filing a judgment roll upon a judgment affecting the title of real property, or directing in whole or in part the payment of money, it shall be docketed on the judgment docket of the Superior Court of the county where the judgment roll was filed, and may be docketed on the judgment docket of the Superior Court

of any other county upon the filing with the clerk thereof a transcript of the original docket, and is a lien on the real property in the county where the same is docketed of every person against whom any such judgment is rendered, and which he has at the time of the docketing thereof in the county in which such real property is situated, or which he acquires at any time thereafter, for ten years from the date of the rendition of the judgment," etc. The statutes quoted are the ones that concern us in this controversy.

W. S. Whiting owned 1766 acres of land in Watauga County of the average value of $25 an acre. On 12 October, 1918, W. S. Whiting and wife executed a deed of trust on this land to G. M. Sudderth, trustee, to secure B. B. Dougherty and five others as accommodation endorsers on five notes for $5,000 each. The deed in trust was recorded in the register of deeds office for Watauga County, 13 November, 1918.

W. S. Whiting and wife conveyed by deed to Florence E. Boyd, the plaintiff, on 13 September, 1919, at the price of $25 an acre, 260⅓ acres of the 1766 acres of land that the above lien was on. The deed to this land was recorded in Watauga County on 22 November, 1922.

The defendant obtained a judgment against W. S. Whiting, which was docketed in the Superior Court of Watauga County, 13 November, 1922, for the sum of $328.85 and interest.

Nothing else appearing, the judgment of defendant against W. S. Whiting having been docketed some nine days before the deed of Whiting to plaintiff would take priority over plaintiff's deed. *Eaton v. Doub, ante,* 14. This priority is given by virtue of the statutes before mentioned.

This Court has rigidly upheld the registration acts—a hard holding in the *Eaton case,* but necessary to the safe conduct of business. It makes no difference how full and formal the notice is, actual or otherwise, it will not supply the place of registration. *Trust Co. v. Sterchie,* 169 N. C., 21; *Davis v. Robinson,* 189 N. C., 601; *Saleeby v. Brown, ante,* 138; *Trust Co. v. Currie, ante,* 260.

The question now to be considered is whether those salutary cases can be differentiated from the present case. When W. S. Whiting and wife made the deed in trust to G. M. Sudderth, trustee, to secure Dougherty and others, the following provision was inserted in the trust deed: "Provided, that as said land is sold from time to time, with the approval of said trustee, the proceeds shall be applied pro rata to the payment of said notes and the accrued interest thereon." Whiting made a deed to plaintiff for 260⅓ acres for $25 an acre, on 13 September, 1919, part of the 1766 acres. This deed was placed in escrow with G. M. Sudderth, trustee. Sudderth was trustee in the deed in trust on the 1766 acres of land made by Whiting to secure Dougherty and the other endorsers. This

land had to be sold with the "approval" of Sudderth, the trustee. Sudderth did not join in the deed to plaintiff and the same was not sold at public sale under the power contained in the trust. The money that was paid on the land by plaintiff was paid to Sudderth who paid it on the notes Dougherty and others were endorsers on. Plaintiff paid Sudderth $1,000 in cash, later $2,000 more before the Whiting deed to plaintiff was registered. The balance of the purchase money, $3,833.33, was paid since the deed was registered and since the docketing of the judgment of defendant against Whiting. Whiting was adjudged a bankrupt in 1924. Dougherty and others paid nothing by reason of their endorsement, but the indebtedness the notes secured by deed in trust to Sudderth, trustee, have been fully paid and satisfied. The deed in trust by Whiting and wife to Sudderth, trustee, was at the date of the institution of this action and now is uncanceled of record. The sale of the land was with the approval of Sudderth, trustee.

In *Ijames v. Gaither,* 93 N. C., 361, it is held: "When a mortgage or deed of trust is registered upon a proper probate, it is held to have the effect of notice to all the world and attaches itself to the legal estate, and is notice to a subsequent purchaser from the mortgagor. *Flemming v. Burgin,* 2 Ired. Eq., 584; *Leggett v. Bullock,* Busb., 283; *Robinson v. Willoughby,* 70 N. C., 358." *Collins v. Davis,* 132 N. C., 106; *Dill v. Reynolds,* 186 N. C., 293; *Bank v. Smith,* 186 N. C., 642.

This brings us to construe the rights of the plaintiff under the proviso in the deed in trust from Whiting to Sudderth, trustee, to secure Dougherty and others. We think the clear language and intention was that when Whiting sold any of the land from time to time as expressed in the proviso, the money was to be applied on the Dougherty and others note, and this sale must be made with the approval of Sudderth, trustee. This approval, the clear intent, accepted and customary business methods in such cases, was for the trustee to join in the conveyance with Whiting to plaintiff, so she could obtain a good title free from the lien of the deed in trust—frequently the *cestui que trust.* Dougherty, the other endorsers, and any that hold the notes join in. In the present case, the power is given Sudderth, the trustee—his approval.

A conveyance of an interest in land must be in writing. Sudderth, trustee, received the purchase price, applied it in accordance with the proviso in the deed in trust, but has failed to carry out the further trust to join in the Whiting deed to plaintiff and convey the land for which he received the purchase money. Defendant had record notice that this deed in trust, with the proviso in it, was uncanceled of record. In a court of equity—a court of conscience, where justice is administered—Sudderth, trustee, had plaintiff's money under the terms of the trust – $3,000 purchase money—before defendant's judgment was taken.

In the present case, the real transaction—the purchase of the land—was through Sudderth, trustee. He received the purchase money and, under the proviso, applied it on the Dougherty and others notes, but has failed to make title to plaintiff. The defendant, under the proviso, and the facts and circumstances of this case, had the mere naked title. The transaction was all in good faith.

In *Johnston v. Lemond,* 109 N. C., p. 651, under similar facts, *Merrimon, C. J.,* said: "He did not, and could not under the circumstances, buy it from the mortgagor—he could only buy it effectually from the mortgagee, and that he did, because the latter gave his assent and his consent to the arrangement as effectually as if he had originated it. If the title had revested in the mortgagor under misapprehension, it might be that the lien of the docketed judgment would have attached, as contended by the plaintiff. But there was no evidence to prove that it did revest for an instant, or at all."

We do not think the case of *Tarboro v. Micks,* 118 N. C., 162, applicable here. In that case the mortgage was canceled of record. The proviso in the deed of trust in the present case made the trustee practically the vendor. The money was paid by plaintiff, not to the debtor Whiting, but to the trustee, Sudderth. Plaintiff could not get a title except through Sudderth. Nor are the other cases cited by defendant applicable under the facts here: *Bostic v. Young,* 116 N. C., 766; *Journal Publishing Co. v. Barber,* 165 N. C., 478; *Realty Co. v. Carter,* 170 N. C., 5; *Joyner v. Reflector Co.,* 176 N. C., 274.

Sudderth, trustee, under the proviso, in consideration of having received the $3,000 purchase money must convey and release the title he has to plaintiff and her heirs and assigns. We cannot see how the subsequent payments, balance of purchase money paid on the land, under the findings of fact, enures to the benefit of defendant. After the trustee conveys to plaintiff, as his trust will then be completed, the deed in trust should be canceled. Defendant's judgment being a cloud on plaintiff's title, should be canceled so far as plaintiff is concerned.

It appears from the record that the findings of fact by the judge below are taken from certain judgments that show that Sudderth, the trustee, is a party to the action. In conformity to this opinion, he is required to make title as herein set forth, and defendant is ordered to cancel its judgment so far as plaintiff's title is involved—same being a cloud on the title. It may be noted that a material finding of fact by consent was added after the learned judge in the court below rendered his decision.

The judgment below is

Reversed.

IVY RIVER LAND & TIMBER COMPANY, CENTRAL BANK & TRUST COMPANY, AS TRUSTEE, AND BANKERS TRUST & TITLE INSURANCE COMPANY v. THE AMERICAN INSURANCE COMPANY, OF NEWARK, N. J., AND DIXIE FIRE INSURANCE COMPANY.

(Filed 23 December, 1925.)

1. Removal of Causes—Federal Statutes—Diversity of Citizenship—Parties—Separable Controversies.

Where upon motion to remove a cause from the State to the Federal Court under the provisions of the Federal Statutes for diversity of citizenship and separable controversies, and contested upon the ground that a resident defendant was united, the motion will be granted if the suit is separable, and the resident defendant is not an indispensable party to the determination of the controversy between the plaintiff and the nonresident defendant.

2. Same—Insurance—Policies—Coinsurance Clauses.

Where the "coinsurance clause" of a fire insurance policy limits the liability of a defendant insurance company and makes it ratable with other companies who have issued fire policies upon the property destroyed, upon a motion by a nonresident company to remove the cause from the State to the Federal Court, the fact that one of the coinsuring companies is a resident defendant is not sufficient to deny the motion, such defendant not being an indispensable party to the determination of the suit against the movant nonresident company, and the controversy being separable as to the cause of action alleged against it and fully determinable without the presence of the resident defendant.

3. Same—Proper Parties—Necessary Parties.

While it is expedient to sue all insurance companies whose policies cover a loss by fire in the same action, yet the causes are separable, upon motion to remove the cause by a nonresident defendant to the Federal Court for diversity of citizenship, and while resident defendants are proper parties they are not indispensable ones.

4. Same—Entire Controversy.

Upon motion to remove a cause from the State to the Federal Court for diversity of citizenship, where movant is a nonresident and the controversy separable, and the resident defendant is only a proper party, the entire cause is now properly removed under the provisions of the existent Federal Statutes.

APPEAL by plaintiffs from BUNCOMBE Superior Court. *Lane, J.*

Motion by defendant, The American Insurance Company of Newark, N. J., to remove this action to Federal Court. From an order granting defendant's motion for removal, plaintiffs appealed. Affirmed.

The plaintiff, Ivy River Land & Timber Company, was the owner of a large amount of lumber in which its coplaintiffs were interested as

mortgagees thereof. The American Insurance Company, 11 November, 1924, issued and delivered to the plaintiff, Ivy River Land & Timber Company, a certain policy of insurance, wherein it agreed to insure the said plaintiff against loss or damage by fire in the sum of $10,000 on its said lumber, and 11 December, 1924, The Dixie Fire Insurance Company issued a like policy in like sum on said lumber, both policies contained loss-payable clauses by which plaintiff, Central Bank & Trust Company and Bankers Trust & Title Company, became interested in said insurance policies. These policies contained the usual "eighty per cent coinsurance clause," by which it is stipulated that the insured shall, at all times, maintain insurance on the property insured, of not less than 80 per cent of the actual cash value thereof, and that in failing so to do, the insured shall be an insurer to the extent of such deficit, and in that event shall bear its proportion of any loss; also a pro rata liability clause as follows: "This company shall not be liable for a greater proportion of any loss or damage than the amount hereby insured shall bear to the whole insurance covering the property, whether valid or not, and whether collectible or not." The property covered by these policies was totally destroyed by fire. In addition to the policies issued by the defendants, plaintiff had other policies of insurance on this lumber aggregating $41,500. Plaintiff prayed for a judgment against the defendants in the sum of $20,000.

In apt time the defendant, The American Insurance Company, of Newark, N. J., filed its petition and bond for removal to the Federal Court. The American Insurance Company of Newark, N. J., is, and has, at all times, been a corporation of the State of New Jersey, and not a corporation of the State of North Carolina. The Dixie Fire Insurance Company has, at all times, been a corporation of the State of North Carolina, and not a corporation of any other state. The value of the lumber destroyed is sufficient to cover the amount of all insurance thereon.

Mark W. Brown for plaintiffs.
Jones, Williams & Jones for defendants.

VARSER, J. The cause of action alleged against the defendant, the American Insurance Company, a New Jersey corporation, must be separate and distinct, that is, separable from the cause of action alleged against the Dixie Fire Insurance Company, a North Carolina corporation, in order to permit the removal to the District Court of the United States for the Western District of North Carolina.

This separability depends upon whether the cause of action is several or joint. *Bank v. Hester,* 188 N. C., 68; *Morganton v. Hutton,* 187 N. C.,

740. The removal statute, Judicial Code, sec. 28 (U. S., compiled 1918, p. 133), provides, among other causes for removal, that, "when in any suit mentioned in this section there shall be a controversy that is wholly between citizens of different states, and which can be fully determined as between them (*R. R. v. Grayson,* 119 U. S., 240; *Wilson v. Oswego Township,* 151 U. S., 56; *Storage Co. v. Ins. Co. of North America,* 151 U. S., 368), then either one or more of the defendants actually interested in such controversy may remove said suit into the District Court of the United States.

A suit may, in this jurisdiction, consist of several legally distinct controversies, and in such suit a person is entitled to remove when such person is a defendant and the cause of action asserted against such person is separate and distinct, that is, may be wholly determined between such defendant and the plaintiff, or plaintiffs, so asserting it, and all the indispensably necessary parties on one side are citizens of different states from those on the other. *Hyde v. Ruble,* 104 U. S., 407; *Ayres v. Wiswall,* 112 U. S., 187; *Greer v. Mathieson,* 190 U. S., 428; *Graves v. Corbin,* 132 U. S., 571; *Yulee v. Vose,* 99 U. S., 539; *Corbin v. Van Brunt,* 105 U. S., 576; *Frazer v. Jennison,* 106 U. S., 191.

If the defendant, or defendants, who seek to remove, are jointly liable, either in tort (*Ry. Co. v. Dowell,* 229 U. S., 102; *McAllister v. R. R. Co.,* 243 U. S., 302), or in contract (*R. R. v. Ide,* 114 U. S., 52; *Pirie v. Tvedt,* 115 U. S., 41; *Core v. Vinal,* 117 U. S., 347; *Sloane v. Anderson,* 117 U. S., 275), the requisite separability does not exist.

If they are severally liable each defendant is liable only for the amount due by virtue of the cause of action alleged against him, and is not liable for the cause of action alleged against his codefendant who is a resident of the same state with the plaintiff, then such defendant who is a resident of a different state from that of the plaintiff may remove. *Barney v. Latham,* 103 U. S., 205; *Venner v. Sou. Pacific Co.* (C. C. A.), 279 Fed., 832, 836, *certiorari* denied, 258 U. S., 628; *City of Winfield v. Wichita* (C. C. A.), 267 Fed., 47. Separable causes of action remain separable, although assigned to one plaintiff, when viewed on a motion to remove (*Patterson v. Bushnall,* 203 Fed., 1021), and same is true in a suit on individual note as to one defendant who is also sued on a joint note with another defendant. *Old Dominion Oil Co. v. Superior Oil Co.,* 283 Fed., 636.

The test as to whether the alleged cause of action as to the defendants, who are of diverse citizenship, is separate and distinct, is whether a separate suit could have been maintained between plaintiff or plaintiffs against the defendants, in separate actions, and the determination of neither of such separate suits, is essential to the disposition of the other.

Morganton v. Hutton, supra; Greer v. Mathieson, supra; Peper v. Fordyce, 119 U. S., 468; *Fraser v. Jennison,* 106 U. S., 191; *Boatman's Bank v. Fritzen* (C. C. A.), 135 Fed., 650, writ to review denied by U. S. Supreme Court, 198 U. S., 586, 212 U. S., 368; *Torrence v. Shedd,* 144 U. S., 531. A joint tort is not separable. *McAllister v. R. R. Co., supra; Hill v. R. R.,* 178 N. C., 607; *Meyer v. Const. Co.,* 100 U. S., 457; *Blake v. McKim,* 103 U. S., 336; *Hyde v. Ruble,* 104 U. S., 407; *Salem Trust Co. v. Finance Co.,* 264 U. S., 188; *Ferry v. Wiggins,* 287 Fed., 422; *City of Winfield v. Wichita, supra; Boatman's Bank v. Fritzlen, supra; Torrence v. Shedd, supra; Chesapeake & O. Ry. Co. v. Dixon,* 179 U. S., 132; *Sou. Ry. v. Carson,* 194 U. S., 136; *R. R. v. Bonon,* 200 U. S., 221; *R. R. v. Miller,* 220 U. S., 413; *R. R. v. Schwyhart,* 227 U. S., 184; Hughes on Federal Procedure (2 ed.), 333.

In determining this question, the rule is that only *indispensably necessary parties* should be considered. *Ferry v. Wiggins Co.,* 287 Fed., 421; *Allen v. Hauss,* 290 Fed., 253; *Galluchat v. Pittman,* 288 Fed., 917; *Barney v. Latham, supra; Beal v. R. R.,* 298 Fed., 180; *Bank v. Hester, supra; Cochran v. Montgomery Co.,* 199 U. S., 272; *Sutton v. English,* 246 U. S., 204; *Webb v. Sou. Ry. Co.,* 235 Fed., 583; *Venner v. Sou. Pac. Co.,* 279 Fed., 837; *Colleton Mercantile & Mfg. Co. v. Savannah River L. Co.,* 280 Fed., 361; *City of Winfield v. Wichita Natural Gas Co., supra; Salem Trust Co. v. Manufacturers' Finance Co.,* 280 Fed., 805; *Old Dominion Oil Co. v. Superior Oil Co., supra; Smathers v. Leith,* 92 N. E. Eq., 169.

The complaint is the basis for determining the question of separability. *Chicago Rock Island & Pac. Ry. v. Dowell,* 229 U. S., 102, 113; *Ry. v. Thompson,* 200 U. S., 206; *Ill. Central R. R. v. Sheegog,* 215 U. S., 308; *Staton v. R. R.,* 144 N. C., 135; *Hollifield v. Telephone Co.,* 172 N. C., 714; *Patterson v. Lumber Co.,* 175 N. C., 92; *Hough v. R. R.,* 144 N. C., 700, 702; *Smith v. Quarries Co.,* 164 N. C., 338; *Powers v. R. R.,* 169 U. S., 92; *Chesapeake & Ohio Ry. Co. v. Dixon, supra; R. R. v. Ide,* 114 U. S., 52; *Morganton v. Hutton, supra; Roberts v. Underwood Typewriter Co.,* 257 Fed., 584; *Barney v. Latham, supra; Davis v. Rexford,* 146 N. C., 418, 424; *Thorn, etc., Co. v. Fuller,* 122 U. S., 535; *Tobacco Co. v. Tobacco Co.,* 144 N. C., 352, 367; *Bank v. Hester, supra;* Hughes' Federal Procedure (2 ed.), 320, sec. 120.

Applying the foregoing rules, we are constrained to hold that this cause is removable. There is no citation of authority needed to demonstrate the right of plaintiffs to maintain a separate suit against the movant without the joinder of the Dixie Fire Insurance Company. The cause of action sued on consists of the promise of each defendant, as set forth in its policy of insurance, based upon the consideration paid there-

for, which promise was accepted by the plaintiffs, and the event upon the happening of which the promise becomes absolute, the destruction of property insured by fire has happened, and the failure of each defendant to pay the amount claimed by plaintiff thereon. The defendants are not responsible for the promises of each other, either by way of joint obligation or as surety or guarantor. The coinsurance and prorating clauses in each policy are stipulated methods by which the amount of the liability of each defendant is calculated in the light of other events therein specified; hence, these causes of action are clearly separable and are so separate and distinct that separate actions can be maintained on each policy and complete relief as between the insured and the insurer had in such separate actions without the presence of the other defendant. As a matter of convenience and under the procedure statutes in this State, it is proper to join these defendants. In fact, all insurance companies who have issued policies on the property destroyed are proper parties, but not *necessary* parties. *Pretzfelder v. Ins. Co.*, 116 N. C., 491; *Ayers v. Bailey*, 162 N. C., 211; *Redmon v. Ins. Co.*, 184 N. C., 483; *Bank v. Ins. Co.*, 187 N. C., 97; *Bank v. Assurance Co.*, 188 N. C., 747. In *Pretzfelder v. Ins. Co., supra*, there was a demurrer for misjoinder of causes of action, and the opinion interpreted in the light of this demurrer, and not upon a motion to remove, clearly holds that there was a proper joinder and the demurrer was overruled, and the rule therein announced has been applied without exception since that time.

The plaintiffs also contend that, if separability exists, as contemplated by the removal statute, it was error on the part of the court below to order the action removed in its entirety. Prior to the adoption of the present removal statute, such separation would have been valid, but the present statute operates to remove the suit; the entire suit or action, as styled by our statutes (C. S., 391, 392, 394) as distinguished from the controversy, is removable. *Barney v. Latham, supra.* The reasoning of *Mr. Justice Harlan*, who delivered this opinion, is conclusive. *Connell v. Smiley*, 156 U. S., 335; Hughes' Federal Procedure, (2 ed.), 337; *Hoge v. Canton Ins. Office of Hong Kong*, 103 Fed., 513; *Hyde v. Ruble, supra; Hamilton v. Empire Gas & Fuel Co.*, (C. C. A.), 297 Fed., 422, *certiorari* denied 13 October, 1924, Supreme Court Rep. Vol. 45, p. 92.

Upon the plain language of the removal statute as construed in these well-reasoned authorities, there is no error in the order of removal directing the removal of the entire suit.

Let is be certified that the judgment appealed from is

Affirmed.

NANNIE McGUIRE, Administratrix of the Estate of F. W. McGUIRE, Deceased, v. MONTVALE LUMBER COMPANY.

(Filed 23 December, 1925.)

1. Statutes—Actions—Wrongful Death—Damages—Statutes in Derogation of Common Law.

The statute permitting a recovery by the personal representative for the estate of a decedent for his wrongful death, is in derogation of a common law and its provisions must be strictly construed in order to maintain the action.

2. Process—Wrongful Death—Statutes.

In order to recover damages for the negligent killing of plaintiff's intestate, this enabling statute provides that the action "may" be commenced in one year: *Held*, the word "may" is construed as "must."

3. Actions—Discontinuance—Service—Alias Summons.

Where an action is brought to recover damages for the negligent killing of plaintiff's intestate, and the summons has been returned unserved, it is now required that the plaintiff sue out an uninterrupted chain of alias summons, and a failure to do so will be fatal to the maintenance of his action, unless service is made within the statutory period of one year.

4. Process—Summons—Clerks of Court—Term—Discontinuance.

Under our procedure in order to expedite the trial of causes, the summons is made returnable before the clerk of the court, at a certain time, which time corresponds to a term of the court under the former act, and where a summons in an action for damages for a wrongful death has been returned unserved, the failure of the plaintiff to move before the clerk of the court for an alias summons on or before the return day thereof works a discontinuance of the action. C. S., 480.

Appeal by plaintiff from Jackson Superior Court. *Bryson, J.*

Action to recover for the wrongful death of plaintiff's intestate. From a judgment of dismissal, plaintiff appeals. Affirmed.

The order dismissing this action is as follows:

"This cause coming on to be heard before his Honor, T. D. Bryson, judge, at the October Term, 1925, of the Superior Court of Jackson County, upon motion of the defendant for an order dismissing said action for that upon the face of the record it appeared the said action had abated by lapse of time prior to the date of the issuing of the summons herein.

"Upon an examination of the record in this case and after hearing and considering argument of counsel for both parties, the court finds the following facts:

"(1st) That the action was instituted for the purpose of recovering damages on account of the wrongful death of plaintiff's intestate.

"(2d) That plaintiff's intestate, F. W. McGuire, died on 14 July, 1924, as appears from the complaint, which was filed 5 October, 1925.

"(3rd) That a summons was issued in this action by the clerk of the Superior Court of Jackson County on 10 July, 1925, directed to the sheriff of Swain County, which summons was returnable on 28 July, 1925; that said summons was returned by the sheriff of Swain County not served, and was not returned by said sheriff until after the expiration of the return day mentioned in the summons.

"(4th) That on 18 September, 1925, the clerk of the Superior Court of Jackson County made an order that an alias summons issue in said action, which order was made fifty-one days after the return day of the original summons, and that no order for alias summons was made by said clerk prior to said 18 September, 1925.

"(5th) That on 18 September, 1925, the clerk of the Superior Court of Jackson County issued another summons in said action, marked alias, which summons was served upon the defendant on 24 September, 1925, the return date in said summons being 5 October, 1925.

"(6th) That the 12 months period in which an action may be instituted to recover damages for wrongful death expired on 14 July, 1925.

"(7th) That no regular or special term of the Superior Court of Jackson County has intervened between the date of the issuing of the summons of 10 July, 1925, and the issuing of the summons dated 18 September, 1925.

"Upon the foregoing findings of fact, it appearing to the court that a regular chain of summonses has not been issued, as required by statute, and that more than 12 months had elapsed from the date of the death of plaintiff's intestate, F. W. McGuire, at the date of the issuing of summons, bearing date 18 September, 1925, it is, therefore, ordered that the defendant's motion to dismiss be granted, and that the said action stand abated and dismissed."

W. R. Sherrill, Alley & Alley and R. L. Phillips for plaintiff.
S. W. Black for defendant.

VARSER, J. Plaintiff's intestate was killed in a blast explosion in a mine operated by the defendant 14 July, 1924. Plaintiff alleges that her intestate's death was caused by the negligence of the defendant.

The facts appearing in the order dismissing this action are not disputed. A discontinuance has resulted. The plaintiff did not obtain on the return date of the summons, 28 July, 1925, an order for an alias summons, and cause it to be executed.

In *Hatch v. R. R.*, 183 N. C., 617, the controversy mainly centered around the question as to whether the facts constituted any service at

all, and after holding that the facts constituted no service, *Adams, J.*, for the majority, says: "After the return day the writ lost its vitality and service thereafter made could not confer upon the court jurisdiction over the defendant so served," citing 19 Ency. P. & P., 600; 21 R. C. L., 1273; 32 Cyc., 456; *S. v. Kennedy,* 18 N. J. L., 22; *Hitchcock v. Haight,* 7 Ill., 603; *Draper v. Draper,* 59 Ill., 119; *Peck v. LaRoche,* 86 Ga., 314; *Cummings v. Hoffman,* 113 N. C., 268; *Peebles v. Braswell,* 107 N. C., 68; *Mfg. Co. v. Simmons,* 97 N. C., 89.

In the *Hatch case,* which occurred under the former practice when the summons was returnable to term, the Court further says: "That the original summons must be followed by process successively and properly issued in order to preserve a continuous single action referable to the date of its issue, is familiar learning. This successive process is an alias or pluries writ of summons. *Fulbright v. Tritt,* 19 N. C., 492; *Penniman v. Daniel,* 91 N. C., 434; *S. c.,* 93 N. C., 332; *Etheridge v. Woodley,* 83 N. C., 11; *Battle v. Baird,* 118 N. C., 861."

C. S., 480, requires that when the defendant is not served with summons "within the time in which it is returnable," the plaintiff may issue an alias or pluries summons, returnable in the same manner as original process. This statute permits the plaintiff so to do, and, inasmuch as our practice in the Superior Court, in this regard, is based upon the statute, "may" means "must" and is mandatory. The true office of an alias summons is to continue the action referable to its original date of institution, when the summons first issued has not been served. *Powell v. Dail,* 172 N. C., 261; *Rogerson v. Leggett,* 145 N. C., 7. Under the present statutory regulations, chapter 92, Public Laws, Extra Session, 1921; chapter 68, Public Laws 1923; chapter 16, Public Laws 1925, as reënacted and appearing in C. S., vol. III, secs. 476, 492-a, *et seq,* which came into force and effect after *Hatch v. R. R., supra,* the return of summons has changed from "the term" to a specific date, which was, in the instant case, 28 July, 1925. Under the former statutes, described in *Campbell v. Campbell,* 179 N. C., 413, the acts suspending the Code of Civil Procedure (chapter 76, Laws 1868-69, ratified 22 March, 1869), known as the "Bachelor Act," continued in effect (contrary to its original intent that it should be temporary and remain in force only until 1 January, 1871), until the "Crisp Act" (chapter 304, Laws 1919). The "Crisp Act," with other pertinent statutes, was combined and adjusted and amended and reënacted in chapter 92, Public Laws, Extra Session, 1921. The Legislature enacted these laws to prevent delay, and expense in legal proceedings. This has proved to be a successful effort to expedite court procedure and avoid its delays and consequent expense, which had, in many instances under the former system, amounted to a denial of justice. Consequently, when the summons was

made returnable before the clerk on a specific date, and the plaintiff required to file his complaint on or before the return date, unless it had been filed, or filed and served, prior thereto, all of the powers and duties heretofore exercised by the judges in term-time in reference to alias or pluries summons, were vested in the clerk. The clerk is required to exercise this jurisdiction and to make appropriate orders at the instance of the plaintiff, or interested defendant, on or before the return date, and the return date for this purpose is, in all essential qualities, a term of court. Therefore, when the plaintiff failed to take any steps, whatever, to sue out an alias summons on the return date, to wit, 28 July, 1925, the sheriff of Swain County, having not returned the process prior to that time showing whether service had been made or not, a discontinuance resulted as is contemplated in C. S., 480, 481. *Rogerson v. Leggett, supra; Hatch v. R. R., supra.*

We have recently said that it was the duty of parties to give a law suit that attention which a prudent man gives to important business. *Sluder v. Rollins,* 76 N. C., 271; *Roberts v. Allman,* 106 N. C., 391; *Pepper v. Clegg,* 132 N. C., 312; *Lumber Co. v. Chair Co., ante,* 437. This statement was made in reference to the duty of a defendant to attend to the case in which he had been served with process. This rule applies with equal force to the plaintiff who applies to the court, which is a public agency, an integral part of one of the coördinate branches of the government exercising sovereign powers, to give it the exact attention which has been required by the sovereign itself when it permits the exercise of this function. A law suit is a serious matter. A plaintiff who has a personal cause of action and resides in Cherokee County may summon the defendant from Dare County, when the simple requirements of the statute are complied with. It must needs be that an orderly system of procedure is necessary to protect the rights of all parties and a strict compliance with the rules in regard thereto, which have, in the instant case, been prescribed by the Legislature, is necessary in order to preserve the rights which the plaintiff had when the action was originally instituted. The new summons issued after the expiration of the one year from the death of plaintiff's intestate, and after a discontinuance had resulted, is insufficient to comply with (C. S., 160) the North Carolina Lord Campbell's Act, originally 9 and 10 Victoria, chapter 93 (1846). This statute requires the action to be brought within one year after the death of plaintiff's intestate. It is not a statute of limitations, which must be pleaded by the defendant (C. S., 405), but it is a condition annexed to plaintiff's cause of action, and at the trial the plaintiff is required to prove that the action was instituted within the time prescribed by law. *Hatch v. R. R., supra; Taylor v. Iron Co.,* 94 N. C., 526; *Best v. Kinston,* 106 N. C., 206; *Gulledge v. R. R.,* 147 N. C., 234;

S. c., 148 N. C., 568; *Hall v. R. R.*, 149 N. C., 109; *Trull v. R. R.*, 151 N. C., 546; *Bennett v. R. R.*, 159 N. C., 346; *Hinnant v. Power Co.*, 189 N. C., 122.

This is an enabling act, and, inasmuch as the right of action for wrongful death did not exist prior to 1846, that is, at common law, its requirements are exclusive and permissive. *Hinnant v. Power Co., supra*, where *Mr. Justice Adams* states the history of this well-settled proposition.

We, therefore, conclude that the judgment appealed from must be Affirmed.

STATE v. C. L. SAULS.

(Filed 23 December, 1925.)

1. Indictment—Sufficiency—Statutes—Criminal Law.

Under the provisions of C. S., 4623, an indictment will not be quashed for insufficiency in charging the offense if in plain, intelligible and explicit manner, sufficient matter appears to enable the court to proceed to judgment.

2. Same—Incest—Motion to Quash.

Where an indictment charges that a father did feloniously and incestuously have intercourse with his daughter, and is otherwise sufficient, the mere fact that it failed to charge "carnal" knowledge, is not a fatal defect that would sustain the defendant's motion to quash the indictment.

3. Same—Common Law.

Incest was not indictable at common law, and being made a felony by statute, C. S., 4337, 4338, the indictment must charge the crime substantially within the terms of the statute.

4. Evidence—Instructions—Bias—Interest—Appeal and Error—Requests for Special Instructions—Objections and Exceptions.

Where the trial judge charges the jury in a criminal action to scrutinize the evidence of the defendant and that of all his close relations who have testified in his behalf upon the trial, before accepting it as true, in the absence of the refusal of a special request to that effect, it is not reversible error for him to have failed to extend the caution to other interested witnesses, such matters being a subordinate and not a substantive feature of the trial.

5. Courts—Sound Discretion—Appeal and Error.

The discretion of the trial judge given him over the trial of a cause is rarely interfered with, though his action may be set aside for such gross abuse as would invade the legal rights to the prejudice of the appealing party; and under the facts in this case it is held that no abuse of this discretion or the invading of defendant's constitutional rights (N. C. Const., Art. I, secs. 11 and 17), was made to appear on the trial. What is in law the meaning of sound discretion of the trial judge, pointed out by ADAMS, J.

STATE *v.* SAULS.

APPEAL by defendant from *Sinclair, J.*, at May Term, 1925, of the Superior Court of WILSON. No error.

The indictment was as follows:

The jurors for the State, upon their oath, present: That C. L. Sauls, late of the county of Wilson, on the ..... day of October, in the year of our Lord 1923, with force and arms at and in the county aforesaid, feloniously and incestuously did have intercourse with Hattie Sauls, said C. L. Sauls being the father of said Hattie Sauls, against the form of the statute in such case made and provided, and against the peace and dignity of the State.

The defendant was convicted and from the judgment pronounced he appealed, assigning errors which are set out in the opinion.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

Woodard & Rand, A. O. Dickens and Manning & Manning for the defendant.

ADAMS, J. Though punishable by the ecclesiastical courts of England as an offense against good morals, incest was not indictable at common law. It was made a felony in this State by the act of 1879. C. S., 4337, 4338; *S. v. Keesler,* 78 N. C., 469; *S. v. Cutshall,* 109 N. C., 764, 774; *S. v. Brittain,* 117 N. C., 783. As it is of statutory origin an indictment therefor must charge a crime substantially within the terms of the statute. The act denounced as a felony is carnal intercourse between grandparent and grandchild, parent and child, and brother and sister of the half or whole blood. Sec. 4337. The word "carnal" as qualifying the word "intercourse" was omitted from the indictment, and upon this ground the defendant in apt time moved to quash the bill and excepted to the denial of his motion.

In our criminal procedure it is provided that every indictment shall be sufficient in form for all intents and purposes if it express the charge against the defendant in a plain, intelligible, and explicit manner, and that it shall not be quashed by reason of any informality or refinement if sufficient matter appear therein to enable the court to proceed to judgment. C. S., 4623. The indictment, construed in the light of this statute, need not charge carnal intercourse in express words; it is sufficient if other language of equivalent import is used. In preparing the bill the draftsman used equivalent language. Webster defines incest as "the crime of cohabitation or sexual commerce between persons related within the degrees wherein marriage is prohibited by law," and "incestuous" as "guilty of incest." Worcester and The Century Dictionary give substantially the same definition. Incestuous intercourse is essen-

tially carnal intercourse. While the precise question has not been decided here, indictments charging "incestuous intercourse" have been sustained in other states. *S. v. Learned,* 85 Pac. (Kan.), 293; *Hintz v. State,* 17 N. W. (Wis.), 639; *Mercer v. State,* 92 So. (Fla.), 535; *S. v. Morgan,* 176 N. W. (S. D.), 35; *S. v. Dana,* 10 At. (Vt.), 727; *Baker v. State,* 30 Ala., 521. The crime was charged in a plain, intelligible, and explicit manner not easily to be misunderstood by the defendant. We think there was no error in denying the motion to quash the indictment.

The jury were instructed to "scrutinize the evidence of the defendant and that of all his close relatives before accepting it as true," and the defendant excepted because the instruction was not extended and applied to all interested witnesses. The exception must be overruled. In *S. v. O'Neal,* 187 N. C., 22, it is said: "Instruction to scrutinize the testimony of a witness on the ground of interest or bias is a subordinate and not a substantive feature of the trial, and the judge's failure to caution the jury with respect to the prejudice, partiality, or inclination of a witness will not generally be held for reversible error unless there be a request for such instruction."

There is another exception which demands consideration. The defendant was arrested on 15 May, 1925, at 9:30 a. m., on a warrant charging him with an assault on a female person (C. S., 4215); and at one o'clock on the same day the grand jury returned three indictments against him, two of them charging an assault, the other charging incest. The defendant, having been brought into court, stated that he had not been able to secure and confer with counsel and was not ready for trial; and the judge said he would continue the case either to the night session or until the next morning. The defendant replied that he would try to get ready for trial at the night session. The court convened at 7:30 p. m. and the defendant filed an affidavit and made a motion for continuance, alleging that immediately upon his arrest in the morning he had been confined in jail, had not been informed of the nature of the charge against him until one o'clock, had not been able to confer with counsel at all until 4:30 p. m. and then not satisfactorily, and that certain witnesses were necessary for his defense. The motion was denied and an exception was duly entered.

It is earnestly insisted by the defendant that he was denied his constitutional rights (Art. I, secs. 11, 17) and in any event that the refusal to grant his motion was such an abuse of discretion as entitles him to a new trial.

We are unable to see in what respect the defendant's constitutional rights were denied him unless by the judge's refusal to grant the continuance. The exception, then, finally depends on the question whether

there was an abuse of discretion, and that is really the position that was taken on the argument.

In *Armstrong v. Wright,* 8 N. C., 93, *Henderson, J.,* said: "The very act of vesting a discretionary power proves that the subject-matter depends on such a variety of circumstances, where each shade may make a difference, that it is impossible to prescribe any fixed rules or laws by which the subject can be regulated. And, although it be said that a sound discretion means a legal discretion, yet when we ask what the legal discretion is, we are as much at a loss as we were before the definition to declare the rules or laws by which the discretion shall be regulated. To prescribe fixed rules for discretion is at once to destroy it. This opinion is very much supported by the practice in England. I do not know a single case where any decision depending on discretionary power has been the subject of a writ of error, and I think that the power of this Court to correct errors in law extends not to those errors which may be committed in the exercise of a discretion, but only to those where the fixed and certain rules, emphatically called laws, are mistaken."

It was subsequently held in a number of decisions that the refusal to continue a case rests in the judge's discretion upon matters of fact which this Court has no power to review. *S. v. Duncan,* 28 N. C., 98; *S. v. Collins,* 70 N. C., 242; *Austin v. Clarke,* 70 N. C., 458; *Moore v. Dickson,* 74 N. C., 423; *S. v. Lindsey,* 78 N. C., 499; *S. v. Scott,* 80 N. C., 366; *Henry v. Cannon,* 86 N. C., 24; *Dupree v. Ins. Co.,* 92 N. C., 418; *S. v. Pankey,* 104 N. C., 841; *Banks v. Mfg. Co.,* 108 N. C., 282; *S. v. Hunter,* 143 N. C., 607.

In other cases it is held that while the exercise of discretion must be judicial and not arbitrary it is not subject to review unless "the circumstances prove beyond doubt hardship and injustice" (*Moore v. Dickson, supra*); or "palpable abuse" (*McCurry v. McCurry,* 82 N. C., 296; *Slingluff v. Hall,* 124 N. C., 397); or "gross abuse" (*S. v. Blackley,* 138 N. C., 620; *S. v. Dewey,* 139 N. C., 557; *S. v. R. R.,* 145 N. C., 495; *S. v. Burney,* 162 N. C., 614). In *Hensley v. Furniture Co.,* 164 N. C., 149, *Mr. Justice Walker* expressed the Court's conclusion in this language: "Judicial discretion, said Coke, is never exercised to give effect to the mere will of the judge, but to the will of the law. The judge's proper function, when using it, is to discern according to law what is just in the premises. *'Discernere per legem quid sit justum.' Osborn v. Bank,* 9 Wheat., 738. When applied to a court of justice, said *Lord Mansfield,* discretion means sound discretion guided by law. It must be governed by rule, not by humor; it must not be arbitrary, vague, and fanciful, but legal and regular. 4 Burrows, 2539. While the necessity for exercising this discretion, in any given case, is not to be determined by the mere inclination of the judge, but by a sound and enlightened

judgment, in an effort to attain the end of all law, namely, the doing of even and exact justice, we will yet not supervise it, except, perhaps, in extreme circumstances, not at all likely to arise; and it is therefore practically unlimited. We do not interfere unless the discretion is abused. *Jarret v. Trunk Co.,* 142 N. C., 466." And in *S. v. Riley,* 188 N. C., 72, *Chief Justice Hoke* said: "Defendants excepted, first, that they were ruled to a trial of the cause at the same term the bill of indictment was found and so soon after the alleged theft that they were, in effect, denied the right to obtain necessary evidence; but our decisions are to the effect that this is a matter within the discretion of the trial judge and not the basis of a valid exception, unless there has been manifest abuse, and, on the facts presented, we are of opinion that no such abuse has been made to appear. *S. v. Burnett,* 184 N. C., 783; *S. v. Sultan,* 142 N. C., 569." See, also, *S. v. English,* 164 N. C., 498.

One reason for *Mr. Justice Walker's* statement that the trial judge's discretion is "practically unlimited" may be found in the following language of *Chief Justice Ruffin:* "It is the province of the court in which the trial takes place to judge of the truth or sufficiency of the causes assigned for a motion for a continuance or removal of a trial. It must be so; else it would be in the power of a prisoner to postpone a conviction indefinitely, however clear his guilt, by making affidavits with the requisite matter on the face of them."

The modern application of the rule has thus been summarized: When the discretion of the trial judge is exercised with a reasonable degree of judicial acumen and fairness, it is one which the higher courts are loth to review or to disturb. The mere fact that the case was disposed of with unusual dispatch is not an ear mark of error. The presiding judge must be to a certain extent free to secure a speedy and expeditious trial, when such speed and expedition are not inconsistent with fairness. While it is not necessary, to constitute abuse, that the court shall act wickedly or with intentional unfairness, it is essential to show the commission of a clear or palpable error, without the correction of which manifest injustice will be done. Familiar with all the attendant circumstances the judge has the best opportunity of forming a correct opinion upon the case presented and has the benefit of a presumption in favor of his action. 16 C. J., 452, sec. 822 (2).

So far as we may determine from the record an order of continuance would not have been subject to legitimate criticism, but we have not discovered such an abuse of discretion as results in a denial of the due process of law.

No error.

T. M. ALEXANDER ET AL v. LAURA FLEMING ET AL.

(Filed 23 December, 1925.)

1. Estates—Remainders—Conditional Fee.

Under a devise of an estate in remainder to be divided between testator's son and daughters, upon condition that they have bodily heirs, and should any of them die without such heirs, then to the others, etc., the son, after the falling in of the life estate, takes a fee defeasible upon his dying without such heirs.

2. Same—Wills—Dower—Election—Statutes.

Where a devisee takes a defeasible fee in lands, and dies intestate without the conditions performed, his widow can acquire no right of dower in the lands thus devised to him, and therefore she is not put to her election to take either under the will or under the law, C. S., 4100.

3. Dower—Estates—Descent and Distribution.

The widow's right to dower rests upon the theory that during coverture her deceased husband died intestate, seized of an estate which any child she may have borne him might have taken by descent.

APPEAL by plaintiffs from *Lane, J.*, at August Term, 1925, of the Superior Court of CABARRUS.

This is an action for the recovery of land. The plaintiffs allege that they and the defendants Byron Kimmons and Nina Faggart, who declined to become parties plaintiff, are the owners of the land described in the complaint, that the defendant Laura Fleming wrongfully withholds possession thereof, and that they are entitled to damages. The material facts are as follows: T. A. Fleming, under whom all the parties claim title, died 1 February, 1900, seized of certain real estate. He made a will (R. W. Fleming qualifying as one of the executors), in which he named as his surviving children Mary Jane Alexander, Harriet Jenette Kimmons, Algeria Melissa Gillon, and R. W. Fleming. Mrs. Alexander and Mrs. Kimmons are dead, survived by children and grandchildren; Mrs. Gillon is living; R. W. Fleming died testate on 4 February, 1923, leaving surviving him the defendant, Laura Fleming, his widow, but no issue. Margaret Fleming, the widow of T. A. Fleming died during the lifetime of R. W. Fleming. All the surviving heirs or devisees are parties to the action.

In the last will and testament of T. A. Fleming are the following items:

1. I give and devise to my loving and faithful wife, Margaret, all my lands and personal property, money and notes without reserve, to be used by her for her easy and comfortable maintenance during her natural life.

(My surviving children are Mary Jane, wife of J. C. Alexander, Harriet Jenette, wife of R. M. Kimmons, Algeria Melissa, wife of C. C. Gillon, and my son R. W. Fleming.)

2. At the death of my wife, Margaret, I will that lands be equally divided between my children above named subject to the following exception.

3. I will and direct that three discreet men of sound judgment be chosen by my legatees who shall be sworn to act impartially.

4. I will and direct that the commissioners chosen shall first lay off a lot of 15 acres square with my dwelling-house in the center. To that lot shall be added enough of land to equalize it in value with the other shares without taking in account the value of the buildings or any improvements that may be made on any part of the land that may be embraced in the 15-acre lot after the date of this will, which lot shall be marked lot No. 1, and lot No. 1 I will and devise to my son, R. W. Fleming.

5. I will that the remainder of my lands be divided into three lots of equal value and to each of my daughters I give and devise one lot. And they shall cast lots to determine which one of the three lots each one shall have.

7. If any one of my children above named die without leaving heirs of their body, then all that they have inherited under this will shall revert to my estate and be equally divided among my surviving children or their bodily heirs if any one of them be dead and left children.

8. I hereby appoint and constitute my beloved wife, Margaret, and my son, R. W. Fleming, executrix and executor of this my last will and testament which is written with my hand.

The three "discreet men" made partition of the devised lands and allotted to R. W. Fleming lot No. 1, and their report was confirmed by the clerk. At the time of his death R. W. Fleming owned personal property and several tracts of land. He executed his last will and testament in which are the following provisions:

1. I direct my executrix to pay my just debts that I may owe out of the first moneys coming into her hands belonging to my estate.

2. I give and devise to my beloved wife, Laura May Fleming, all my estate, both real and personal or mixed, wherever located or situated, to have and to hold to her absolutely and in fee simple.

3. I hereby constitute and appoint my beloved wife Laura May Fleming, executrix of this my last will and testament.

Laura Fleming resided with her husband on lot No. 1 and after his death continued to reside there until she rented it to F. M. Craven. She qualified as executrix of her husband's estate.

Upon the trial the issues were answered as follows:

1. Are the plaintiffs and Byron Kimmons and Nina Faggart the owners in fee, and entitled to the immediate possession of the lands described in the complaint? Answer: Yes, subject to the dower of Laura Fleming.

2. Is the defendant Laura Fleming in the possession of said lands? Answer: Yes.

3. Is the defendant Laura Fleming in the unlawful possession of said lands? Answer: Yes.

4. What was the clear value of said premises during said possession of said Laura Fleming for the years 1923 and 1924? Answer: $800.

5. What is the amount of taxes and drainage assessments accrued on and paid by the defendant Laura Fleming while in the possession of said premises? Answer: $233.

Only the fourth issue was submitted to the jury, the parties having agreed that the judge should find the facts from the evidence and answer each of the others. Judgment upon the verdict. The cause was remanded to the clerk of the Superior Court with directions to issue a writ of dower appointing freeholders to allot to Laura Fleming her dower in lot No. 1 allotted to her deceased husband. The plaintiffs excepted and appealed upon errors assigned.

M. B. Sherrin and Frank Armfield for plaintiffs.
Hartsell & Hartsell and J. Lee Crowell for defendant.

ADAMS, J. T. A. Fleming devised his real property to his wife "to be used during her natural life," and directed that it be partitioned after her death among the four children named in his will, subject to the provision, "If any one of my children above named die without leaving heirs of their body then all that they have inherited under this will shall revert to my estate and be equally divided among my surviving children or their bodily heirs if any one of them be dead and left children." After the death of the life tenant the land was divided among the testator's three surviving children and the children of Harriet Kimmons, who meanwhile had died. The land in controversy was devised to R. W. Fleming and by virtue of the devise he acquired a title in fee, defeasible in the event of his death without children or heirs of his body. C. S., 1737; *Buchanan v. Buchanan,* 99 N. C., 308; *Whitfield v. Garris,* 131 N. C., 148; *S. c.* 134 N. C., 25; *Wilkinson v. Boyd,* 136 N. C., 46; *Harrell v. Hagan,* 147 N. C., 112; *Elkins v. Seigler,* 154 N. C., 374; *Burden v. Lipsitz,* 166 N. C., 523; *Bizzell v. Building Asso.,* 172 N. C., 158; *Albright v. Albright, ibid.,* 351; *Smith v. Parks,* 176 N. C., 406; *Love v. Love,* 179 N. C., 115; *Walker v. Butner,* 187 N. C., 535.

The question first presented relates to the alleged right of dower in this estate. Whether elsewhere the law on the subject may be uncertain or confused is a matter with which at present we are not concerned, for our decisions furnish an answer to any inference or suggestion that the determinable quality of R. W. Fleming's estate excludes the widow's right of dower. The exact point arose in *Pollard v. Slaughter,* 92 N. C., 72, and *Mr. Justice Ashe,* after an exhaustive review of the English and American authorities, adhered to the principle declared in *Buckworth v. Thirkell,* 3 Bos. & Pull., 652, that the determination of an estate by operation of an executory devise does not defeat either curtesy or dower. See, also, *Midyette v. Grubbs,* 145 N. C., 85; *Allen v. Saunders,* 186 N. C., 349.

The plaintiffs do not impeach these decisions; they assent to them. They make no appeal to the doctrine of equitable election; they admit it is not apposite. Their contention is based on the broad proposition that the appellee elected to remain outside the class of widows who are dowable under our law, for the reason that, her husband having died testate, she did not dissent from his will.

In Coke's First Institute, by Thomas, 450, it is said: "In every case where a woman taketh a husband seized of such an estate in tenements, etc., so as by possibility it may happen that the wife may have issue by her husband, and that the same issue may by possibility inherit the same tenements of such an estate as the husband hath, as heir to the husband, of such tenements she shall have her dower, and otherwise not." "Tenant in dower" says Blackstone, "is where the husband of a woman is seized of an estate of inheritance, and dies; in this case, the wife shall have the third part of all the lands and tenements whereof he was seized at any time during the coverture, to hold to herself for the term of her natural life." Subject to exceptions our statute provides that every married woman, upon the death of her husband intestate, or in case she shall dissent from his will, shall be entitled to an estate for her life in one-third in value of all the lands, tenements, and hereditaments whereof her husband was seized at any time during the coverture. C. S., 4100; *Chemical Co. v. Walston,* 187 N. C., 817. In reference to the construction of this statute the appeal involves two questions: (1) Whether the husband had a devisable estate in the land in controversy; (2) whether the widow's dissent from his will was prerequisite to her right of dower in the defeasible fee.

With respect to the first of these questions Tiffany in his work on Real Property, vol. 1, (2 ed.) sec. 221, says: "The important consideration in this connection is whether the estate out of which dower is claimed came to an end before the husband's death or at the time of such death, the widow being entitled to dower in the latter case and not in the former."

The limitation over took effect and R. W. Fleming's fee was defeated the instant he died, there being no "heirs of his body"; he had no estate in the disputed land which he could dispose of by his will; and no title to it or interest in it was transferred to his wife by his devise of all his real and personal estate. *Smith v. McCrary,* 38 N. C., 204; *Elmore v. Byrd,* 180 N. C., 120. His widow's right to dower rests upon the theory that during coverture he was seized of an estate which any child she might have borne him could possibly have taken by descent. *Pollard v. Slaughter, supra.* Within the meaning of the statute R. W. Fleming did not die intestate as to a defeasible fee which he could not dispose of by will (4 Words & Phrases, 3732; *ibid.,* vol. 2, (2 series) 1170; *Kohny v. Dunbar,* 39 L. R. A., N. S., 1107); and his widow was not required as a condition precedent, or in right of her election, to dissent from a will in which he devised the real and personal property of which he died seized and possessed. Where a husband dies leaving a last will and testament in which he devises his property to his widow, she must take either under the will or under the law. If she elects to take under the will she cannot have dower; but the dissent from her husband's will authorized in C. S., 4100, evidently has reference to property which may be the subject of a devise. R. W. Fleming, as we have said, had no legal right to devise the defeasible fee and his widow, therefore, is not claiming dower in opposition to the will. *Landers v. Landers,* 151 Ky., 206, 214. If he could have devised the land a different question would have arisen and the argument advanced by the plaintiffs would have demanded of the appellee the most serious consideration. In our opinion section 4100 does not apply to the facts appearing of record, and for this reason it was not essential that the widow of R. W. Fleming should dissent from his will before asserting her right of dower in the estate which was determined at his death by operation of the executory devise.

We find

No error.

LYMAN WILSON v. L. A. WILSON.

(Filed 23 December, 1925.)

1. Instructions—Statutes—Evidence—Appeal and Error.

Our statute, C. S., 564, requiring the trial judge to plainly and concisely state the evidence in the case, and declare and explain the law arising thereon, gives to the parties to the action a substantial right. The jury has the sole and exclusive function of finding the facts from the evidence under the law thus given them, and it is not their duty, in any event, to determine what is the law.

2. Same—Damages.

Where a breach of contract for services rendered is at issue, each party contending a breach thereof by the other, and asking for damages, it is required by C. S., 564, that the trial judge charge the jury upon the law in the case arising from the evidence upon the issue as to damages, as well as the other essential features of the case necessary to a correct verdict, and his failure to charge upon this issue, is reversible error.

3. Instructions—Contentions—Appeal and Error.

It is not required by our statute C. S., 564, or by law, that the judge give the contentions of the parties in his instructions to the jury.

4. Instructions—Pleadings.

The pleadings are the basis for the evidence, and the law to be given in the charge to the jury.

APPEAL by defendant from JACKSON Superior Court. *Finley, J.*

Action on account of breach of contract. From a judgment in favor of plaintiff, upon a jury verdict, the defendant appeals. New trial.

A. Hall Johnston, W. R. Sherrill and Alley & Alley for plaintiff.
Walter E. Moore and C. C. Buchanan for defendant.

VARSER, J. The plaintiff sued the defendant for benefits which accrued to the defendant on account of defendant's failure to perform an oral contract to convey a tract of land in consideration of plaintiff's services in operating, and laboring on, the defendant's home place and to pay for farming equipment, and to pay defendant's sister $500 in installments, as set out in the complaint. The defendant says he made contract with plaintiff to convey him the land on compliance with the details thereof, as set out in the answer, and alleges a breach on plaintiff's part and damages resulting therefrom, and from other uses of defendant's property. Each lays the fault at the other's door.

The issues submitted, without objection, and the jury's answers, are as follows:

"1. Did the plaintiff and defendant enter into a contract under the terms of which the defendant agreed to convey to the plaintiff by will or deed the lands referred to in the pleadings, in consideration of plaintiff's services and other considerations as alleged in the complaint and answer? Answer: Yes.

"2. Did the defendant commit a breach of said contract as alleged in the complaint? Answer: Yes.

"3. What amount, if any, is plaintiff entitled to recover of the defendant for services rendered under said contract? Answer: $2,535, less $388, with interest on $2,147.

"4. Did the plaintiff commit a breach of said contract as alleged in the answer? Answer: No.

"5. What amount, if any, is the defendant entitled to recover of the plaintiff by reason of the counterclaim pleaded in the answer? Answer: None."

The defendant challenges the correctness of the trial below in that the charge to the jury does not comply with C. S., 564. This statutory requirement that the judge "shall state in a plain and correct manner the evidence given in the case, and declare and explain the law arising thereon" is intended to give the jury all the law necessary to a proper determination of the issues. The jury's duty is limited to the sole and exclusive function of finding the facts, under the rules of law applicable, and given to them by the judge. This statute (C. S., 564) created a substantial legal right in the parties (*Nichols v. Fibre Co., ante,* 1). It is error to fail to comply with it. In the instant case the court gave a correct charge as to the burden of proof, but did not state the rule for the admeasurement of damages arising from the implied contract, in case the voidable parol contract to convey was disaffirmed and breach and benefits were received.

The contentions of the parties are fully given. That the contentions be given is neither required by the statute, C. S., 564, nor by law. The law arises on the evidence. The basis for the law and the evidence is the pleadings.

It was necessary to state the law arising on the various phases of the evidence, as to benefits received, or services rendered, and the damages to the property used by either of the parties, and on all other facts which the jury should find from the evidence, when such facts constitute a part of the basis for the answers to the issues. *Nichols v. Fibre Co., supra; Richardson v. Cotton Mills,* 189 N. C., 653; *S. v. O'Neal,* 187 N. C., 22; *S. v. Thomas,* 184 N. C., 757; *S. v. Merrick,* 171 N. C., 788, 795; *Hauser v. Furniture Co.,* 174 N. C., 463; *Watson v. Tanning Co., post,* 840.

Of course, this error resulted from a temporary oversight on the part of the careful and painstaking judge who tried this case.

We call attention to the first issue as it appears in the judgment, in so far as it adopted the allegations in the complaint and in the answer. This issue elsewhere in the record omits the words "and answer." If the issue is correctly recited in the judgment, it would, apparently, not support a judgment, for that, the allegations in the complaint and answer are at variance.

We note, also, that the defendant says, in his testimony, that he has, at all times, been able, ready and willing to comply with the contract on his part, and indicates his present readiness so to do. If the jury shall find these statements to be facts, an entirely new situation will present itself. There must be a

New trial.

MRS. MARY A. BROWN v. V. J. GUTHERY, L. D. SOUTHERLAND, T. B. E. SPENCER AND JOHN F. DURHAM.

(Filed 23 December, 1925.)

1. Estates—Wills—Deeds and Conveyances—Remainders.

A conveyance of lands by the life tenant and the remainderman, whether the latter takes as sole heir at law of the testator, or by vested or contingent remainder, under the will of his father, conveys to the grantee the life estate and the interest of the remainderman therein, whether it be the fee simple, or otherwise.

2. Estates—Reversion.

A reversion is the residue of an estate left by operation of law in the grantor or his heirs at law, or in the heirs of the testator, if created by will, commencing in possession on the determination of the particular estate granted or devised.

3. Estates—Remainder—Reversion—Wills—Devise—Deeds and Conveyances.

In order to construe the words of a grantor in a deed or the testator in a will as creating an estate by reversion or remainder, the intent of the parties as gathered from the instrument prevails, and the improper use of the one or the other of these words is not controlling.

4. Same—Title.

A devise of an estate to the testator's wife for life, and upon her death to revert to his son "if he be alive, or to his heirs if he be dead," is held to pass to the son a remainder contingent upon his surviving his mother, and a conveyance made by the wife and son passes her life estate in the lands to the grantee, and a contingent interest of the son in remainder, and not the indefeasible fee-simple title in the lands conveyed.

5. Estates—Contingent Remainders—Vested Interests.

Remainders are vested when the estate is invariably fixed to remain in a determinate person after the particular estate is spent, and contingent when limited to take effect on an event or condition which may never happen or be performed, or which may not happen or be performed until after the determination of the preceding particular estate.

6. Estates—Contingent Remainders—Rule in Shelley's Case.

A devise to the testator's wife for life, remainder to his son "if he be alive or to his heirs if he be dead": *Held*, if the remainderman is survived by the life tenant, the estate may go to his heirs, who take as remaindermen in fee, and not by descent, and the rule in *Shelley's case* does not apply.

APPEAL by defendants from judgment of Superior Court of MECKLENBURG, September Term, 1925. *Bryson, J.* Reversed.

Controversy without action, in which the parties hereto present to the court, for determination, their respective contentions relative to the title of plaintiff to a lot of land in Henderson County. Plaintiff contends

that she is seized in fee of and can convey an indefeasible title to said lot, in performance of her contract with defendants; defendants contend to the contrary. The facts with respect to said title are as follows:

Marion C. Toms died during the year 1917, leaving his last will and testament, which has been duly probated and recorded. Item three of said will reads as follows: "I give and bequeath unto my beloved wife, Katie B. Toms, the following property, to be held by her during the term of her natural life, and upon her death to revert to my son, Charles French Toms, if he be alive, or to his heirs, if he be dead, viz.: The house and lot where I now live in Hendersonville, North Carolina, on the west side of Main Street."

Mrs. Katie B. Toms, widow of Marion C. Toms, and Charles French Toms, his only son and heir-at-law, survived said Marion C. Toms and both are now living. Charles French Toms is the stepson of Mrs. Katie B. Toms. On 8 August, 1925, said Mrs. Katie B. Toms and Charles French Toms jointly executed and delivered to plaintiff, Mrs. Mary A. Brown, a deed with full covenants of warranty and seizin, purporting to convey to plaintiff the lot described in the will of Marion C. Toms; thereafter, defendants entered into a contract in writing with plaintiff by which they agreed to purchase said lot of land, and to pay to her the purchase price thereof, upon the execution and delivery by plaintiff of a deed conveying to them an indefeasible title in fee simple to said lot. Plaintiff has tendered to defendants a deed sufficient in form to convey to them the said lot in full performance of her contract. Defendants have declined to accept said deed, and to pay the purchase price for said lot, contending that said deed does not convey to them an indefeasible title in fee simple for the reason that plaintiff does not own a fee-simple estate in said lot.

The court being of opinion that upon the statement of agreed facts submitted, plaintiff has an indefeasible title in fee simple to said lot, and that the deed tendered by plaintiff will convey such title thereto, rendered judgment in favor of plaintiff and against defendants. From this judgment, defendants appealed to the Supreme Court.

Ewbank & Whitmire and C. H. Gover for plaintiff.
C. A. Cochran for defendants.

CONNOR, J. By the deed dated 8 August, 1925, executed jointly by Mrs. Katie B. Toms and Charles French Toms, plaintiff acquired and is now the owner of all the right, title and estate of her said grantors in and to the lot of land described in the statement of agreed facts. At his death, Marion C. Toms was seized in fee and in possession of said lot. It is conceded that by virtue of his last will and testament, Mrs. Katie B. Toms, his widow, owned only an estate in said lot for the term

of her natural life; this she conveyed by her deed to plaintiff, who, therefore, has title to the life estate of Mrs. Katie B. Toms which would pass to and vest in defendants by her deed tendered to them.

If Charles French Toms owned the fee in said lot, remaining upon the termination of the life estate of Mrs. Katie B. Toms, either in reversion as heir-at-law of his father, or in remainder as devisee in the will, such fee passed to and vested in plaintiff by virtue of his deed. If under the will he takes a vested remainder, plaintiff, having acquired the life estate and also such vested remainder, owns the entire estate in fee and her deed to defendants would vest in them an indefeasible title in full compliance with her contract. *Cotton v. Mosely,* 159 N. C., 1. Unless, however, plaintiff has acquired by the deed jointly executed by Mrs. Katie B. Toms and Charles French Toms, not only the life estate of Mrs. Toms, but also the fee, subject only to the life estate, and thus by merger owns the entire fee-simple estate in the lot, defendants' assignment of error must be sustained and the judgment reversed. It therefore becomes necessary to determine what title to or estate in said lot plaintiff acquired by the deed of Charles French Toms.

Charles French Toms is the only heir-at-law of Marion C. Toms. By his will, however, Marion C. Toms devised all his title to and estate in said lot to the devisees named therein; there was no residue of said estate undevised which would or could revert to him or to his heir-at-law. There is no reversion or reversionary interest which by operation of law or otherwise will pass to Charles French Toms upon the determination of the life estate of Mrs. Katie B. Toms. A reversion is defined as the residue of an estate left by operation of law in the grantor or his heirs or in the heirs of a testator, commencing in possession on the determination of a particular estate granted or devised. Black's Law Dictionary, page 1034; 21 C. J., 1016; 23 R. C. L., 1100; 2 Blk. Comm., p. 175. The word "revert" used by the testator in his will with respect to said lot upon the death of the life tenant, cannot be construed as determining the quality or character of the estate which the testator provided therein for his son, Charles French Toms. The words "revert" or "reversion" are sometimes loosely used to describe an interest differing from a technical reversion. A reversion does not become a remainder, or a remainder a reversion because it is so called in the instrument creating it. 21 C. J., 1017. Plaintiff's contention that the use of this word by the testator clearly implies an intention on his part that the fee, remaining upon the falling in of the life estate, shall pass to Charles French Toms in reversion as heir-at-law, and not in remainder as a devisee, is not well founded. The word is manifestly used in the will in the sense of "pass" or "go" and not "return" for the testator devised the lot, after the death of his wife, first to his son, Charles French Toms, if he be alive, and second, if he be dead, to his heirs-at-law and not to the

heirs-at-law of the testator. *Whitehurst v. Gotwalt,* 189 N. C., 577. The estate acquired by plaintiff under the deed from Charles French Toms, was not a reversion, which descended to him as heir of his father, or which passed to him under the will, but was a remainder in fee devised to him by the will of Marion C. Toms. Is such remainder vested or contingent during the continuance of the life estate of Mrs. Katie B. Toms now owned by plaintiff?

Vested remainders are defined by *Justice Walker* in *Richardson v. Richardson,* 152 N. C., 705, as those by which the present interest passes to the party, though to be enjoyed in the future, and by which the estate is invariably fixed to remain in a determinate person after the particular estate is spent. A remainder is said to be contingent "when it is limited to take effect on an event or condition which may never happen or be performed or which may not happen or be performed until after the determination of the preceding particular estate in which case such remainder can never take effect."

By his will, the testator gave the lot, upon the death of his widow, to his son, Charles French Toms, if he be alive; during the life of the widow the estate in remainder is not "invariably fixed" in Charles French Toms, with the right of enjoyment only postponed until the falling in of the life estate. He takes no estate under the will until the happening of the event provided therein for the vesting of such estate, to wit, his survival of the life tenant. If, upon the death of Mrs. Katie B. Toms, he be dead, he takes nothing; the lot in that event goes to his heirs, who will take the fee in remainder as purchasers under the will and not by descent from Charles French Toms. By virtue of the deed to her of Charles French Toms, plaintiff owns the remainder in fee, contingent upon Charles French Toms being alive at the death of Mrs. Katie B. Toms. Until the happening of the latter event it cannot be determined whether plaintiff owns an indefeasible title in fee to said lot or not.

In *Allen v. Smith,* 183 N. C., 222, the testator, after devising his real estate to his wife for and during her natural life, provides that "at the death of my wife, if my son, Arthur E. Smith, should survive his mother, I give all my estate both real and personal to him during his life and at his death then to be equally divided among my children who then may be living—if any of my children should be dead, their heirs to inherit their share." It was held that as Arthur E. Smith's life interest was contingent upon his surviving his mother and that as he failed to survive her, such interest did not vest in him. The remainder was contingent upon his surviving his mother. In the instant case, if Charles French Toms is living at the death of Mrs. Katie B. Toms, under the will the remainder will then vest in him in fee simple. In no event is a life estate limited to him, and the rule in *Shelley's case* does not apply.

In the event that Charles French Toms be dead at the death of Mrs. Katie B. Toms, such persons as are included within the class designated as his heirs, will take the remainder in fee, under the will.

It was error to hold that plaintiff has an indefeasible title in fee to the lot described in the statement of agreed facts and that the deed tendered by her to defendants will convey title in accordance with her contract. The judgment must therefore be

Reversed.

W. M. ANDERSON v. R. C. WALKER.

(Filed 23 December, 1925.)

1. Limitation of Actions—Adverse Possession—"Color of Title"—Common Source of Title—Evidence—Instructions—Appeal and Error.

Where in an action to recover lands the plaintiff has introduced evidence tending to show a connected chain of title to a grant from the State, and the defendant does not claim under a common source by adverse possession, with or without color, testimony of a witness as to a conversation between himself and such former owner in possession under the deed, in effect that this former owner had told him he had swapped a piece of his own land for the *locus in quo*, tends to show a completed transaction, and a claim under adverse ownership, and an instruction allowing this evidence to be considered by the jury on the question of permissive user or as a tenant at will only, is reversible error.

2. Same—Deeds and Conveyances—Consideration—Registration.

Where a grantee in a deed to lands upon a valuable consideration fails to have it recorded under the provisions of our registration statute (Connor Act), and enters into possession thereunder, such deed does not constitute color of title as against a subsequent grantee of the same lands for a valuable consideration, by a duly registered deed, when the parties are claiming under a common source of title.

3. Deeds and Conveyances—Registration—Consideration—"Color."

Where a conveyance of lands is without valuable consideration, the grantee cannot invoke the registration statute (Connor Act) to declare a prior registered deed to the same lands was not "color" of title.

APPEAL by defendant from CHEROKEE Superior Court. *Finley, J.*

Action to recover land. From a judgment in favor of plaintiff, defendant appeals. New trial.

Plaintiff sues to recover a described twelve-acre tract of land, lying between Notla River and the mountain ridge. The boundaries are not in dispute. Defendant is in possession, and the sole disputed questions were the title and the character of defendant's possession.

M. W. Bell and D. Witherspoon for plaintiff.
Dillard & Hill for defendant.

VARSER, J. The defendant denies the plaintiff's title and says that his actual possession of the *locus in quo* is rightful. Plaintiff claims title and alleges that the defendant's possession is wrongful.

The agreed case on appeal states:

"Plaintiff introduced a State grant and showed that the grant embraced the lands in question, and made out a chain of title from the State grant to plaintiff. . . . The defendant relied upon adverse possession without color of title for the statutory period; on adverse possession with color of title for the statutory period, and in support of their contentions introduced evidence showing continuous and unbroken possession of the lands in question for the period of time required by the statute to ripen title."

Plaintiff claims title under Grant No. 2476 to G. W. Dickey for tract No. 57, 4th District, containing 153 acres, registered in Book J-10, page 326, dated 11 February, 1863.

The plaintiff claims under devisees in the will of G. W. Dickey, deceased, through one, William Anderson, whose deed is dated 1 June, 1922, and the evidence tended to show that it covered the 12 acres in controversy.

The defendant, however, did not offer to connect himself with the grant to G. W. Dickey, but offered the deed from W. H. Anderson to Carrie Owenby, dated 15 July, 1911, registered 11 February, 1916, and from Owenby and wife to defendant, dated 25 April, 1917, registered 8 August, 1917; also his deed to Center and Abernathy, and from Center and Abernathy to defendant, dated 14 November, 1922.

The defendant contended that he and those under whom he claims had been in the continuous adverse possession of the *locus in quo* for more than 20 years, and that under the Owenby deed, he had been in continuous adverse possession since its date, 25 April, 1917, and that Owenby had been in possession since the date of the Anderson deed to him, 15 July, 1911, and that, although, the Anderson-Owenby deed was not registered until 11 February, 1916, it was color of title prior to its registration.

We find it necessary to consider only one group of defendant's exceptions. One, Mull, was called by plaintiff, in rebuttal, and testified that he knew W. H. (Harvey) Anderson, under whom defendant claimed, and that he was acquainted with the *locus in quo*, and knew its boundaries and knew it while Anderson was cultivating it. This witness was then asked the following question:

"Q. What statement did Harvey Anderson make to you while he had that little bottom in corn? A. We were just talking along. He already owned that upper part and he was talking about swapping to Mr. Dickey and getting that lower piece and said he swapped off a piece of his land at the family graveyard and said he had a right nice little place over there and wanted to sell it to me."

The defendant in apt time objected to both question and answer, but the evidence was permitted.

The court charged the jury, among other things, that, "if you find that W. H. Anderson was there under a verbal contract to trade and stayed there under that agreement that would not be adverse possession; that would be possession by consent of the real owner, and he would be a tenant at will of the real owner, Dickey, and it would not be adverse until he did some act, to establish possession that would be entirely antagonistic to the true owner."

The "little bottom" referred to is the *locus in quo*. This 12 acres is formed by a ridge which bends out into the 153-acre Dickey tract and cuts off some 12 acres between the top of the ridge and the waters of Notla River.

The defendant contends that he was prejudiced by the admission of this statement, and also by the use which the court below allowed the jury to make of this statement.

We are of opinion that, inasmuch as this evidence does not tend to characterize the possession (*Nelson v. Whitfield,* 82 N. C., 46; *Bivings v. Gosnell,* 141 N. C., 341; *Steadman v. Steadman,* 143 N. C., 350) of Anderson as holding as permissive tenant of Dickey, but purports to recite an executed transaction, wherein there had been a swap, or trade, of lands, it was incompetent, for that parol evidence of a conveyance of land cannot, under the instant circumstances, be admitted over a timely objection. *Locklear v. Paul,* 163 N. C., 338. It was not an effort to describe the lands or to designate it as being the "Dickey land," and it did not tend to show an executory contract, by which Anderson was to receive, if he complied with the terms thereof, later, a conveyance.

We, also, hold that if this evidence be competent, that it shows that Anderson was claiming the property as his own against Dickey and all the world, and, therefore, his possession was not permissive but was adverse. *Woods v. Coal Co.,* 84 Ala., 560; *Newsome v. Snow,* 91 Ala., 641, 24 A. S. R., 934, 1 R. C. L., 751; *Gossom v. Donaldson,* 68 Am. Dec., 723; *Kern v. Howell,* 180 Pa. St., 315; *Valentine v. Cooley,* 33 Am. Dec., 166; *Wilkinson v. Bottoms,* 174 Ala., 122; *Tenn. Coal, Iron & R. R. Co. v. Linn,* 123 Ala., 112; *Martin v. R. R.,* 83 Maine, 100; *Jermyn v. McClure,* 195 Pa. St., 245; *Bartlett v. Secor,* 56 Wis., 520; *Quigg v. Zeugin,* 82 Conn., 437.

In the light of the statement in the agreed case on appeal, that the parties do not claim under a common source, the charge of the court permitting the jury, with this parol evidence, to connect the defendant with a common source and to convert Anderson's possession into possession under Dickey, was erroneous.

It appears from the record that the parties do not claim under a common source, and the rule as to color of title set forth in *Collins v. Davis,* 132 N. C., 111, applies. *Mr. Justice Connor,* the author of the Connor Act, speaking for a unanimous Court, says: "Where one makes a deed for land for valuable consideration and the grantee fails to register it, but enters into possession thereunder and remains therein for more than 7 years, such deed does not constitute color of title and bar the entry of a grantee in a subsequent deed for a valuable consideration who has duly registered his deed." In *Collins v. Davis, supra,* the Court was distinguishing between the rule in *Austin v. Staten,* 126 N. C., 783, and reaffirmed in *Lindsay v. Beaman,* 128 N. C., 189, which stated that an unregistered deed is not color of title, and limited the rule in *Austin v. Staten, supra,* to apply in favor of creditors and subsequent purchasers for a valuable consideration from a common source. Hence, the converse is true that, unless the subsequent purchaser has paid a valuable consideration (*King v. McRackan,* 168 N. C., 621), he cannot invoke the Connor Act to declare that his adversary's unregistered deed is not color of title.

For the reasons indicated herein there must be a

New trial.

MRS. J. E. WAGGONER v. WESTERN CAROLINA PUBLISHING COMPANY.

(Filed 23 December, 1925.)

1. Principal and Agent—Scope of Agent's Authority—Ratification—Newspaper Circulation Contest.

Where the plaintiff has been induced by the false and fraudulent representation of the agent of a newspaper in a circulation campaign, to pay out her own money for subscriptions for newspapers, sent by her to other persons, and has knowingly retained the money: *Held,* upon the principle of ratification of an agent's act the defendant newspaper may not avoid liability upon the ground that the agent was acting beyond the scope of his authority to the plaintiff's knowledge.

2. Gaming—Newspaper Circulation Contest—Fraud—In Pari Dilicto—Contracts.

Where the agent of the defendant in a newspaper circulation contest has wrongfully induced the plaintiff to pay to him her own money for

sending the newspapers to others, and she sues upon the agent's fraud and deceit, recovery may be had upon the grounds alleged, and the position of the defendant that the transaction was against good conscience and public morals, and that no recovery could be had because plaintiff was *in pari dilicto*, is unavailable.

3. Contracts—Public Policy—Immoral Contracts—Actions.

A contract contravening sound public policy or *contra bonos mores* is void, and an action thereon may not be maintained in our courts.

APPEAL by defendant from *Stack, J.*, at May Term, 1925, of CATAWBA.

Civil action to recover the sum of $500 alleged to have been fraudulently obtained from the plaintiff by the defendant's agent and representative while conducting a subscription prize contest.

It is alleged, and supported by evidence, that the defendant is engaged in the publication of a newspaper, *The Times Mercury*, at Hickory, N. C.; that during the month of November, 1922, in an effort to increase the circulation of said newspaper, the defendant inaugurated a subscription campaign, in which prizes were offered to successful contestants, according to certain terms, rules, conditions and provisions, duly published in said newspaper prior to and during said campaign; that the defendant's agent, one Stevens, who was in charge of and conducting the campaign for the defendant and who was informed at all times as to the standing of the different contestants, falsely and fraudulently represented to plaintiff that if she would put, first $200 and then later $300, in said campaign, subscribing out of her own funds for the equivalent of 100 and later 150 copies of the paper at the price of $2.00 per annum, and sending them to such persons as she cared to name, she would thereby certainly win the first prize offered, to wit, a Studebaker automobile; that relying upon these representations, which were false and fraudulently made, the plaintiff was induced to part with $500 in the manner suggested; that she did not win the first prize, or the automobile, though she did win the third prize, a diamond ring, which her husband carried home, but which, according to plaintiff's testimony, she did not accept—same having been tendered back to the defendant, before and at the time of trial, and that the defendant received her money under the conditions above set out and refused to return any part of it after notice from the plaintiff and before any of the names furnished by her had been placed on the defendant's subscription list, or at least before the papers were mailed to those from whom she did not have bona fide subscriptions.

Upon denial of liability and issues joined, the jury returned the following verdict:

"1. Did the defendant, through its agent, Stevens, fraudulently obtain from the plaintiff $500 in cash, as alleged in the complaint? Answer: Yes.

"2. If so, what amount, if any, is the plaintiff entitled to recover of the defendant? Answer: $500 with interest thereon from 29 November, 1922."

From a judgment on the verdict in favor of plaintiff, the defendant appeals, assigning errors.

A. A. Whitener for plaintiff.
R. J. Mander, J. W. Aiken and Self & Bagby for defendant.

STACY, C. J., after stating the case: The defendant earnestly contends that if the false and fraudulent representations charged against its agent were made by him, he was acting beyond the scope of his authority, without the knowledge, consent or contrivance of the defendant, and contrary to the published rules under which the contest was being conducted, and that all this was done with the full knowledge of both plaintiff and defendant's agent, for which reason, defendant says, the plaintiff ought not to be permitted to maintain this action.

In reply to this position, it would seem to be sufficient to point out that, with full knowledge of all the circumstances, the defendant has received and still holds the money fraudulently obtained by its agent from the plaintiff. The defendant will not be permitted to repudiate the act of its agent as being beyond the scope of his authority, and at the same time accept the benefits arising from what he has done while acting in its behalf. *Starkweather v. Gravely,* 187 N. C., 526. It is a rule too well established to admit of debate that if a principal, with full knowledge of the material facts, takes and retains the benefits of an unauthorized act of his agent, he thereby ratifies such act, and with the benefits he must necessarily accept the burdens incident thereto or which naturally result therefrom. The substance of ratification is confirmation after conduct. 2 C. J., 467. It is also a settled principle of ratification that the principal must ratify the whole of his agent's unauthorized act or not at all. He cannot accept its benefits and repudiate its burdens. *Bank v. Justice,* 157 N. C., p. 375.

The defendant, therefore, having taken and received the benefits arising from the unauthorized act of its agent, must be held liable to suit upon the principle of ratification, if the act of the agent imports such liability. *Sprunt v. May,* 156 N. C., 388.

Responsibility for the act of its agent having been resolved against the defendant under the principle of ratification, it is thereupon, in view of this position, earnestly contended that the understanding between plaintiff and defendant's agent was a thoroughly immoral conspiracy, contrary to public policy, and that the courts ought not to aid the plaintiff in her attempt to enforce any supposed rights which she may have, arising out of such understanding or agreement.

It is undoubtedly the law that whatever contravenes sound morality, or is *contra bonos mores,* vitiates any contract and renders void any engagement founded upon it. *"Ex turpi contractu actio non oritur"* was the maxim of the common law and it is still good today. No action can be maintained on an immoral or iniquitous contract. *Munday v. Whissenhunt,* 90 N. C., 458. The courts will not paddle in muddy water, but in such cases the parties are remitted to their own folly. And if the purpose of the present suit were to recover the automobile, or to force the defendant to live up to the agreement of its agent, the plaintiff, had she participated or acquiesced in the fraud, might be face to face with the lesson, taught every day in the school of experience, that she cannot safely put her money in the hands of one who promises to return it with usury made out of ill-gotten gains. The expression, "He that will steal for me will steal from me," coined by a distinguished citizen in describing the discovery of a Western ranchman while dealing with his herdsmen, contains a bit of philosophy, or a nugget of truth, which the plaintiff, no doubt, can appreciate more keenly today than she could in November, 1922.

But the plaintiff's cause of action is not based on contract, nor is she seeking to hold anything awarded to her in the contest. She is suing in tort to recover the amount of money obtained from her by the false and fraudulent representations of the defendant's agent. Her action is one for pure fraud and deceit. *Gladstone v. Swaim,* 187 N. C., 712. We do not think it is open to the defendant on the present record to say to the plaintiff: "My agent lured you into a gamble, therefore take your loss." *S. v. Smith,* 152 N. C., 798. The jury has found that the plaintiff did not participate in a gaming enterprise, but that she was induced to part with her money solely upon the false and fraudulent representations of the defendant's agent.

The plaintiff had a right, under the rules of the contest, to purchase any number of subscriptions, either with her own money or with money contributed by others. What she did was entirely legitimate, according to her allegation, and many bona fide subscriptions were secured or purchased by her. With these she is content. But the gravamen of her complaint is that the defendant's agent fraudulently induced her to put an additional $500 of her own money into the campaign, which she would not have done but for such false and fraudulent representations. The plaintiff limits her action to one for fraud or deceit. For this she has been allowed to recover and for nothing else.

The record presents no reversible error, hence the verdict and judgment will be upheld.

No error.

T. O. PANGLE, ADMINISTRATOR, v. APPALACHIAN HALL.

(Filed 23 December, 1925.)

1. Insane Persons—Hospitals—Negligence—Suicide—Damages.

Where a privately owned hospital for the treatment of mental diseases for gain, receives a patient afflicted with melancholia, and inclined to self destruction, it is liable for the negligence of those in charge of the patient resulting in his suicide.

2. Same—Evidence—Declarations—Principal and Agent—Res Gestae.

A letter written by a physician formerly in charge of a patient at a private hospital for the insane to the plaintiff, as to the manner of the suicide of the patient, after the patient's suicide, that would be evidence of the negligence of the hospital, in respect thereto, is not a part of the *res gestæ*, and is properly excluded upon the trial.

3. Evidence—Conjecture—Pleadings.

In order to recover damages for negligently resulting in the death of another, it is required not only that the complaint sufficiently alleges the negligence complained of, but that the evidence thereof on the trial raises more than a mere conjecture or possibility of the existence of the necessary fact in issue.

4. Insane Persons—Private Hospitals—Treatment—Care Required—Negligence.

Where a privately owned hospital for the treatment of insane persons receives a patient afflicted with melancholia, and having a tendency to self-destruction, its management implies: 1, that its physicians, nurses and attendants possess the requisite degree of learning, skill and ability necessary to the practice of their professions, and which others similarly situated ordinarily possess; 2, that they will exercise ordinary and reasonable care and diligence in the use of their skill and the application of their knowledge to the patient's case: 3, and that in the care thereof they will exercise their best judgment and ability.

APPEAL by plaintiff from *Webb, J.*, at April Term, 1925, of BUNCOMBE.

Civil action for damages, tried upon allegations and denials that plaintiff's intestate came to his death by reason of the defendant's negligence in failing properly to care for said intestate while a patient at defendant's hospital and which resulted in his self-destruction, or suicide.

At the close of plaintiff's evidence and on motion of defendant, the court entered judgment as of nonsuit, from which the plaintiff appeals.

George M. Pritchard and McKinley Pritchard for plaintiff.
J. G. Merrimon for defendant.

STACY, C. J. About the middle of November, 1922, plaintiff's intestate, J. Suber, a farmer living near Newberry, S. C., was brought to

defendant's hospital in Asheville, N. C., by his physician, Dr. W. H. Moore, who testified that Mr. Suber was then in a depressed mental condition, bordering on melancholia; that he informed Dr. M. A. Griffin, one of the managers of the hospital, of the patient's condition, as he had observed it, and told him how Mr. Suber had recently spent a day in the graveyard, near his home, with a shotgun in his hands, under conditions which indicated suicidal tendencies. While thus in the defendant's hospital, where patients are treated for mental and nervous diseases, for private gain, plaintiff's intestate committed suicide on 23 December, 1922, by hanging himself with a rope.

The only evidence as to how the suicide occurred was contained in a letter written by Dr. Griffin to Dr. Moore sometime after Christmas, following the death of plaintiff's intestate. A portion of this letter, in which the writer stated that Mr. Suber had tried to jump in front of a truck about two weeks prior to his death, and which was offered to fix the defendant with further notice of the patient's suicidal mania, was excluded on objection by the defendant, and this forms the basis of one of plaintiff's exceptions. The evidence was clearly incompetent and his Honor committed no error in withholding it from the jury. *Berry v. Cedar Works,* 184 N. C., 187; *R. R. v. Smitherman,* 178 N. C., 595.

The authorities in this State are all to the effect that what an agent says, relative to an act then being done by him within the scope of his agency, is admissible as a part of the *res gestæ,* and may be offered in evidence, either for or against the principal; but what the agent says afterwards, and merely narrative of a past occurrence, though his agency may continue as to other matters, or generally, is only hearsay and not competent as against the principal. *Johnson v. Ins. Co.,* 172 N. C., 142; *Southerland v. R. R.,* 106 N. C., 100.

With this letter excluded, we think the court properly held that the plaintiff had failed to make out a case sufficient to go to the jury on his allegations of negligence.

In *Byrd v. Express Co.,* 139 N. C., 273, after reviewing the authorities, touching the sufficiency of the evidence to support a verdict in favor of the plaintiff, *Walker, J.,* said: "It all comes to this that there must be legal evidence of the fact in issue and not merely such as raises a suspicion or conjecture in regard to it. The plaintiff must do more than show the possible liability of the defendant for the injury. He must go further and offer at least some evidence which reasonably tends to prove every fact essential to his success." To like effect are the decisions in *Crenshaw v. Street R. R.,* 144 N. C., 314, *Fox v. Texas Co.,* 180 N. C., 543, and many other cases too numerous to be cited.

There can be no question about the liability of a privately owned or corporate hospital, conducted for individual gain, and not for charitable

purposes, for damages to its patients resulting from negligence attributable to the agents of such hospital. *Young v. Gruner,* 173 N. C., 622; *Green v. Biggs,* 167 N. C., 417; *Hogan v. Hospital Co.,* 59 S. E. (W. Va.), 943; *Harris v. Woman's Hospital,* 14 N. Y. Sup., 881; *Breeze v. Ry. Co.,* 174 S. W. (Mo.), 409.

Ordinarily, when a hospital, like the present one, undertakes to treat a patient, without any special arrangement or agreement, its engagement implies three things: (1) that its physicians, nurses and attendants possess the requisite degree of learning, skill and ability necessary to the practice of their profession, and which others similarly situated ordinarily possess; (2) that its physicians, nurses and attendants will exercise reasonable and ordinary care and diligence in the use of their skill and in the application of their knowledge to the patient's case; and (3) that its physicians, nurses and attendants will exert their best judgment in the treatment and care of the case. *Mullinax v. Hord,* 174 N. C., 607; *Nash v. Royster,* 189 N. C., 408, and cases there cited. And in the application of this general principle, such hospitals have been held liable for the negligent failure of their officers or employees to guard and restrain insane or delirious patients and prevent them from doing injury to themselves. *Richardson v. Dumas,* 64 So. (Miss.), 459; *Wetzel v. Omaha Maternity, etc., Asso.,* 96 Neb., 636, 148 N. W., 582, 36 Ann. Cas., 1224, and note; 13 R. C. L., 949.

But we need not enter upon a discussion of general principles, which are well established, because in the instant case the plaintiff has offered no sufficient evidence of the defendant's negligence. Allegation alone will not do; he must have some evidence also in order to support a recovery.

On the record, the judgment of nonsuit was properly entered.

Affirmed.

KATE P. JOHNSTON, EVELYN JOHNSTON, D. LILLY JOHNSTON, D. P. TILLETT AND E. B. GRESHAM v. JESSE W. GARRETT.

(Filed 23 December, 1925.)

1. Deeds and Conveyances — Restrictions—Suits—Actions—Parties—Injunction.

Restrictions in a land development and contained in the original deeds as to the number of buildings to be placed upon the lot sold, are covenants running with the lands, and each grantee of such lands may enjoin all other such grantees from violating the restrictions.

2. Appeal and Error—Injunction—Findings—Review.

Upon exception to the findings of fact by the trial judge in injunction proceedings to restrain the violation of covenants running with the lot conveyed in a general scheme of development, the Supreme Court on appeal may pass upon the evidence of record in the case.

3. Deeds and Conveyances — Restrictions — Covenants — Review — Evidence—Records—Former Decisions.

Held, in the Supreme Court, from the record in this case, and the opinion in a former case upon the same subject-matter herein, "Myers Park" land was originally sold and conveyed under a general improvement plan and that the deeds containing certain restrictions as to buildings included the *locus in quo*.

CLARKSON, J., did not sit.

APPEAL by defendant from order of *Lane, J.*, MECKLENBURG Superior Court, Spring Term, 1925.

In this action, begun on 2 April, 1925, plaintiffs pray judgment that defendant be perpetually restrained and enjoined from violating certain conditions and restrictions contained in deeds under which defendant claims title to the lot of land described in the complaint. A temporary restraining order was issued by Judge Lane, dated 2 April, 1925, in which defendant was required to show cause at a subsequent date why the said order should not be continued to the final hearing. Pursuant to said order, defendant with his attorneys appeared before Judge Lane, at Charlotte, N. C., on 9 May, 1925. After hearing evidence offered by both plaintiffs and defendant, Judge Lane signed an order continuing the temporary restraining order until the final hearing. From this order, defendant appealed.

John M. Robinson and Taliaferro & Clarkson for plaintiffs.
E. A. Hilker and D. E. Henderson for defendant.

CONNOR, J. Upon the hearing, at which the temporary restraining order was continued, Judge Lane, from the pleadings, records and evidence offered, found as facts to sustain the order from which defendant has appealed (1) that defendant is the owner of lot No. 11 in block 3-A of Myers Park, as shown on the map thereof recorded in Book 230, at page 129, in the office of the register of deeds of Mecklenburg County; (2) that plaintiffs are the owners, respectively, of lots Nos. 12, 14 and 16 in said block; (3) that plaintiffs and defendant own their said lots, claiming title thereto under deeds containing certain conditions and restrictions set out in the deeds by which the Stephens Company originally conveyed said lots; (4) that defendant, in violation of said conditions and restrictions and in violation of the rights of plaintiffs, and over their protests and without their consent, is now proceeding to erect on his lot a second house or residence so that there would be, if the same is

erected, two houses or residences on same, the second house, when completed, fronting on Edgehill Road; (5) that defendant threatens and intends to subdivide said lot with the result that the lot adjacent to lot No. 12, owned by plaintiffs, the Misses Johnston, will contain less than four-tenths of an acre; and (6) that if defendant proceeds with the erection of said house and the subdivision of said lot according to his plans, it will all result in irreparable harm and damage to plaintiffs and each of them. There was evidence sufficient to sustain each of the foregoing findings. Defendant contends that there was error in continuing the restraining order, for that his Honor did not find that said lots were a part of and included within a general scheme and plan of development of Myers Park, or of the subdivision thereof in which said lots are included. His Honor did not specifically find, as alleged in the complaint, that the Stephens Company, from which both plaintiffs and defendant claim title to their respective lots, in the sale and development of Myers Park, or of said subdivision, followed or enforced a general scheme and plan of development, whereby the lots in said Park, or in said subdivision, were conveyed subject to conditions and restrictions, set out in the deeds therefor, and applicable to all said lots. Evidence, however, was offered, as appears in the statement of the case on appeal, tending to establish the same facts with respect to Myers Park, and said subdivision, as are set out in the statement of facts agreed in *Stephens Co. v. Homes Co.,* 181 N. C., 335, and in *Homes Co. v. Falls,* 184 N. C., 426. Upon these facts this Court has held that the subdivisions of Myers Park are each a separate, distinct and integral development, and that Myers Park, consisting originally of 1100 acres was not planned and developed as a unit, composed of these subdivisions. As to the several subdivisions, as shown on the plats recorded, consisting of lots sold with reference to said plats, it is held that "the principles of estoppel and dedication apply." *Stephens Co. v. Homes Co., supra.* In *Homes Co. v. Falls, supra,* it appeared that plaintiff had secured from all owners of lots in the particular subdivision containing the *locus in quo* duly executed and acknowledged releases, waiving all their rights, if any they had, to insist upon the alleged implied restrictions, and consenting to the sale by the Stephens Company of the lot in controversy as well as of other lots similarly situated. This Court, from the evidence, finds, as it may in a case of this character (*Tobacco Asso. v. Battle,* 187 N. C., 260), that block 3-A in Myers Park, as shown on the plat duly recorded and offered in evidence, was planned and developed under a general scheme by which the lots composing said block 3-A were sold by the Stephens Company and conveyed by deeds containing conditions and restrictions which were inserted therein for the protection and welfare of the community, and which are covenants running with the land.

The Stephens Company, the owner of the land platted as block 3-A, subdivided said block and sold distinct parcels thereof to separate grantees, imposing restrictions practically identical upon the use of each parcel or lot pursuant to a general plan of development or improvement; the lots now owned, respectively by plaintiffs and defendant, are included within block 3-A, and are held under deeds, containing practically identical conditions and restrictions, which the grantees in said deeds as recited therein understood and agreed were for the protection and general welfare of the community, and were covenants running with the land. These conditions and restrictions, upon these facts, may be enforced by any grantee of any of said lots, included within block 3-A, against any grantee of any other lot included in said block. 18 C. J., 394; *Homes v. Falls Co., supra.*

There was no error in continuing the temporary restraining order to the final hearing.

Affirmed.

CLARKSON, J., did not sit.

TENCH C. COXE, SR., GUARDIAN v. WHITMIRE MOTOR SALES COMPANY.

(Filed 23 December, 1925.)

Guardian and Ward—Leases—Landlord and Tenant—Fraud—False Warranty—Damages—Statutes.

Where a lease by the guardian of his ward's lands was not publicly made, C. S., 2171, nor approved by the clerk of the Superior Court, C. S., 2172, the lessee may not hold the ward's estate liable for the false representations of the guardian's agent as to the value of the leased property for the lessee's purposes, nor for his false warranty thereof. The personal liability of the one acting as guardian remarked upon by STACY, C. J.

APPEAL by plaintiff from *Lane, J.,* at September Term, 1925, of BUNCOMBE.

Civil action by plaintiff, landlord, to recover rent from defendant, his tenant, and damages for failure to keep demised premises in repair, as per stipulation in lease.

On 9 February, 1923, the plaintiff, as guardian for M. C. and F. R. Coxe, minors, leased to the defendant the premises described as 99, 101 and 103 Patton Avenue, in the city of Asheville, for a term of two years, beginning on 1 April, 1923, and ending on 31 March, 1925, at a yearly rental of $3,600, payable in monthly installments of $300 each, said premises to be used for motor sales, repair and paint shop.

The defendant took possession of said premises on 1 April, 1923, and occupied the same until 10 December, 1924, at which time he vacated said premises without paying for the last month's rent. This action was instituted on 24 December, 1924, to recover the rent then in arrears and damages for failure to keep said premises in repair, as defendant had agreed to do.

In his answer, the defendant sets up a counterclaim for damages resulting from loss of business, etc., occasioned by the alleged false and fraudulent representations made by plaintiff's agent as to the condition and availability of said premises for use in the prosecution of defendant's business.

Upon the issues thus joined, the jury returned the following verdict:

"1. Was defendant induced to lease the premises in controversy upon the representation that they were in a safe and tenantable condition for use by defendant, as alleged in the answer? Answer: Yes.

"2. If so, was such representation false, as alleged in the answer? Answer: Yes.

"3. If so, what damages is defendant entitled to recover of plaintiff on account of said false representation? Answer: $1,191.

"4. In what amount, if any, is defendant indebted to plaintiff? Answer: $300."

From a judgment entered on this verdict adjudging that the defendant "have and recover of the plaintiff, Tench C. Coxe, Sr., as guardian for M. C. Coxe and F. R. Coxe, minors, the sum of eight hundred ninety-one ($891) dollars and the costs of this action to be taxed by the clerk," the plaintiff appeals, assigning errors.

Leo, Ford & Coxe for plaintiff.
Mark W. Brown for defendant.

STACY, C. J., after stating the case: It is apparent from the face of the record that the judgment entered in this case cannot be sustained. The suit is brought by plaintiff, in his capacity as guardian and on behalf of his wards or their estate. Likewise, the cross-action is directed against the plaintiff in the capacity in which he sues. The defendant's counterclaim is bottomed on an allegation of deceit, or fraud in the treaty inducing the execution of the lease. *Furst v. Merritt, ante,* 397, 130 S. E., 40. He has been allowed to recover for false warranty. The renting was not made publicly (C. S., 2171); nor was the lease approved by the clerk of the Superior Court. C. S., 2172.

Conceding that an action for deceit includes false warranty, such as defendant has recovered for here, we are aware of no statute or de-

cision in this State authorizing a judgment to be taken and entered against a ward or his estate for the false warranty of the agent of a guardian in representing the ward's property to be suitable for certain purposes, such as was done by the plaintiff's agent, according to defendant's allegation, in executing the lease now before the Court. The law would seem to be otherwise. *LeRoy v. Jacobosky,* 136 N. C., 443; *Female Academy v. Phillips,* 68 N. C., 491; *Smith v. Kron,* 96 N. C., 397.

The question of the personal liability of the plaintiff is not presented on the present record. But for a statement of the general rule, see *Jones v. Johnson,* 178 Pac. (Okla.), 984, 21 A. L. R., 903; 12 R. C. L., 1126 *et seq.*

The verdict and judgment will be vacated and the cause remanded, to the end that further proceedings may be had as the law directs and as the rights of the parties require.

New trial.

JIM WATSON v. SYLVA TANNING COMPANY.

(Filed 23 December, 1925.)

Instructions—Evidence—Contentions—Statutes—New Trials.

Under the provisions of our statute, C. S., 564, it is reversible error for the trial judge to fail to instruct the jury upon the law arising from the evidence in the case necessary to a correct finding of their verdict, and a mere summary of the contentions of the parties is insufficient.

APPEAL by defendant from *Finley, J.,* at May Term, 1925, of the Superior Court of JACKSON.

The plaintiff brought suit for the recovery of damages for personal injury alleged to have been caused by the defendant's negligence. Verdict and judgment for the plaintiff and appeal by the defendant upon errors assigned.

Walter E. Moore and Sutton & Stillwell for plaintiff.
Alley & Alley for defendant.

ADAMS, J. The defendant complains that the trial judge in his instructions to the jury failed to "state in a plain and correct manner the evidence given in the case and to declare and explain the law arising

thereon." C. S., 564. In several cases recently decided we have stressed the necessity of observing this requirement and have reiterated the suggestion that a statement of the contentions accompanied with a bare enunciation of a legal principle is not sufficient: it is imperative that the law be declared, explained, and applied to the evidence. Upon at least two of the issues the instructions consist almost entirely of a summary of the contentions of the parties; an error resulting, of course, from the momentary oversight of the cautious and thoughtful judge before whom the case was tried. *Nichols v. Fibre Co., ante,* 1; *Richardson v. Cotton Mills,* 189 N. C., 653; *S. v. O'Neal,* 187 N. C., 22; *S. v. Thomas,* 184 N. C., 757; *S. v. Merrick,* 171 N. C., 788, 795.

For the error complained of there must be a

New trial.

STATE v. ARTHUR MONTAGUE.

(Filed 23 December, 1925.)

Courts—Jurisdiction—Constitutional Law—Special Terms—Judge Appointed—Judge of District—Criminal Law—Capital Felony.

Objection by the defendant charged with a capital felony to the authority of the judge assigned by the Governor of the State to hold a special term of the Superior Court, upon the ground that the judge assigned to hold the courts of the district was in good health, and holding a term of the court in another county within the district, cannot be sustained as repugnant to or unauthorized by our State Constitution, Art. IV, sec. II.

APPEAL by defendant from *Dunn, J.,* at May Special Term, 1925, of BURKE.

Criminal prosecution tried upon an indictment charging the defendant with rape, a capital felony.

From an adverse verdict and statutory judgment of death pronounced thereon, the defendant appeals.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

Spainhour & Mull, S. J. Ervin and S. J. Ervin, Jr., for defendant.

STACY, C. J., The principal exception appearing on the record is the one addressed to the ruling of the court on the defendant's plea to the jurisdiction or the legal authority of the presiding judge to hear the case.

The reasons assigned by the defendant for this position appear in his written motion, filed with the trial court, and are as follows:

"That under section 11, Article IV, of the Constitution of North Carolina, this court and the judge thereof has no right, power or jurisdiction to take cognizance of or try this cause and the grand jury empaneled had no right, power or jurisdiction to find said bill of indictment at this special term of Burke Superior Court held under commission of the Governor of this State for the reason that Honorable A. M. Stack, judge of the Thirteenth Judicial District, now holding and riding the courts of the Sixteenth Judicial District and the judge assigned to the said Sixteenth Judicial District, under said section and article, is not 'unable to preside' by reason of 'protracted illness' or by reason of 'any other unavoidable accident to him,' or by reason of 'sickness, disability, or other cause' within the meaning of said section and article, and for that, on the contrary, the said Honorable A. M. Stack is, at present and during this week and on the day this motion is made, in health and vigor, holding and presiding over the Superior Court of Catawba County, at the regular May term of said court, which said Superior Court of Catawba County is one of the courts of the Sixteenth Judicial District. Wherefore, prisoner prays that his challenge to the jurisdiction of the court be sustained and that this court proceed no further in the trial of this cause."

Upon the defendant's challenge to the jurisdiction of the court, and motion to proceed no further with the trial of the cause, the judge entered of record the following findings and judgment:

"Upon the foregoing motion and challenge, the court finds as facts that the same was made and entered by the prisoner after the return of the bill of indictment as a 'true bill' and after the prisoner, without objection or exception, had been arraigned and had entered his plea of 'not guilty,' said motion and challenge being made and entered immediately prior to the time when the petit jury, which is chosen, sworn and empaneled to try the prisoner, was chosen, sworn and empaneled. The court further finds as facts that the Honorable A. M. Stack, judge of the Thirteenth Judicial District and the judge regularly riding, holding and assigned to the courts of the Sixteenth Judicial District, is now, at the time of said motion and challenge, in possession of his health, strength and vigor and is, at present and during the present week when this cause is called and tried, engaged in presiding over and holding the regular May Term, 1925, of the Superior Court of Cawtaba County, at Newton, in said county, which forms a part of the Sixteenth Judicial District, and by reason of the fact that said term of the Superior Court

of Catawba County is in session as aforesaid is unavailable to hold and preside over this special term of the Superior Court of Burke County. The court further finds as facts that the undersigned judge, the regular judge of the Fifth Judicial District and the judge regularly assigned to hold the courts of the Eighth Judicial District, was assigned by the Governor of North Carolina to hold and preside over the May Special Term, 1925, of the Superior Court of Burke County, which was called by the Governor of North Carolina as set forth in the commission of the Governor calling the same and which is convened and held at the court-house in Burke County after the notice and advertisement required by statute, and that at said time and for said week, there was no emergency judge available to hold said court.

"Upon the foregoing motion and challenge and findings of fact, the prayer, motion and challenge of the prisoner is overruled and denied and the trial of the cause is proceeded with.

ALBION DUNN, *Judge Presiding.*"

The judge was really under no obligation to find the facts set out in this judgment. He held a valid commission from the Governor and that was quite sufficient for him. *Chemical Co. v. Turner, ante,* 471, and cases there cited.

The defendant concedes that his challenge to the jurisdiction and authority of the court to hear his case, under the circumstances disclosed by the judge's findings, cannot be sustained unless we overrule a number of decisions on the subject. *S. v. Wood,* 175 N. C., 809, and authorities there collected. As to these cases, however, the defendant respectfully says that they are in conflict with Article IV, section 11, of the Constitution. We are unable to agree with this position. The defendant's exception is not well taken. The reasons in support of the decisions heretofore rendered in similar cases, and which must be followed now, are fully set forth in *Wood's case* and we deem it unnecessary to repeat them here.

The prisoner's case is of supreme importance to him, and we have given the record a careful and searching scrutiny, but nothing has been discovered by us which apparently calls for any extended discussion. It would serve no useful purpose, so far as the law is concerned, "to thrash over old straw," even though the case be a capital one.

We have carefully examined the remaining exceptions. None of them can be sustaind. The verdict and judgment will be upheld.

No error.

CHARLEY LINDSEY v. SUNCREST LUMBER COMPANY ET AL.

(Filed 23 December, 1925.)

Employer and Employee—Master and Servant—Negligence—Safe Place to Work—Tools and Appliances—Instructions—Appeal and Error—Reversible Error.

The requirement of an employer to furnish his employee a safe place to work within the scope of his employment, and suitable tools and appliances with which to perform it, is such only as requires ordinary care in relation to the surroundings; and an instruction upon the issue of negligence that such was the employer's absolute duty, is reversible error.

APPEAL by defendant from *Finley, J.*, at May Term, 1925, of HAYWOOD.

Civil action to recover damages for an alleged negligent injury sustained by plaintiff, an employee of the defendant, on 2 September, 1922, while working as a "tong hooker" on one of the defendant's loading machines which was being operated as a part of the equipment on the logging train, owned and operated by the defendant in connection with its manufacturing plant.

Upon denial of liability and issues joined, the jury returned the following verdict:

"1. Was the plaintiff injured by the negligence of the defendants, as alleged in the complaint? Answer: Yes.

"2. Did the plaintiff, by his own negligence, contribute to his injury, as alleged in the answer? Answer: Yes.

"3. What damage, if any, is the plaintiff entitled to recover? Answer: $1,800."

From a judgment on the verdict in favor of plaintiff, the defendant appeals, assigning errors.

Morgan & Ward for plaintiff.
Alley & Alley for defendants.

STACY, C. J. We deem it unnecessary to consider more than one exception. The following excerpt, taken from the charge as it deals with the issue of negligence, constitutes one of the defendant's exceptive assignments of error:

"In this connection the court charges you it is the duty of the defendant in a case of this kind to furnish reasonably safe place for its employees to work and to furnish reasonably safe tools and equipment with

which to work, and the failure to do that is negligence, and if you find this was so and it was the proximate cause of the plaintiff's injury, it would be your duty to answer the first issue 'Yes.'"

This instruction, it must be conceded, as it was on the argument, is in direct conflict with what has been said in a number of recent cases, natably, *Murphy v. Lumber Co.*, 186 N. C., 746; *Owen v. Lumber Co.*, 185 N. C., 612; *Gaither v. Clement*, 183 N. C., 455; *Tritt v. Lumber Co., ibid.*, 830; *Smith v. R. R.*, 182 N. C., 296.

It is not the absolute duty of the master to provide for his servant a safe place or a reasonably safe place to work and to furnish him reasonably safe appliances with which to execute the work assigned—such would practically render the master an insurer in every hazardous employment—but it is his duty to do these things in the exercise of ordinary care. *Riggs v. Mfg. Co., ante*, 256. This limitation on the master's duty is not a mere play on words, nor a distinction without a difference, but it constitutes a substantial qualification, or restriction, affecting the rights of the parties. *Cable v. Lumber Co.*, 189 N. C., 840.

The exception on the present record is clear-cut, and the issue of liability one of dispute, hence we must adhere to the decisions on the subject.

The case was before us at the Fall Term, 1924, on a judgment of nonsuit, which was reversed. 189 N. C., 118.

New trial.

R. L. YOUNG AND MOLLIE YOUNG, HIS WIFE, v. BOARD OF COMMISSIONERS OF YANCEY COUNTY ET AL.

(Filed 23 December, 1925.)

Instructions—Conflicting in Material Parts—New Trial.

When a charge to the jury of the law arising from the evidence upon the trial is conflicting substantially, and upon material parts, the jury will not be presumed to have perceived the error and correctly have applied the law, and a new trial will be granted on appeal.

APPEAL by plaintiff from *Ragland, Special Judge*, at March Term, 1925, of the Superior Court of YANCEY.

There were two issues:

1. Did the plaintiff, for a valuable consideration, agree with the Board of Highway Commissioners of Yancey County to grant the right of way over which the road in question was built? Answer: Yes.

2. What amount of damages, if any, is plaintiff entitled to recover? Answer: Not any.

Charles Hutchins for plaintiff.
Watson, Hudgins, Watson & Fouts for defendant.

ADAMS, J. It was alleged that the defendants had entered upon the land of the plaintiffs and had constructed a public road thereon, making fills, embankments, and deep cuts, and damaging the adjacent property in several respects which are particularly set out in the complaint. The defendants admitted the plaintiffs' title and the appropriation of their property (record pp. 3, 19), and by way of a further answer alleged that the plaintiffs had given and granted the right to enter upon their lands and the right to construct the road in consideration of the advantages afforded by an improved highway and in consideration of the building by the defendants of a wall for the protection of the plaintiffs' spring. This further answer was set up as an independent defense, and the trial judge correctly instructed the jury that the defendants had the burden of establishing the alleged contract by the greater weight of the evidence; but he gave the additional instruction that the law required the plaintiffs to establish their contention by the preponderance of the evidence, and if the jury should find by the greater weight of the evidence that the alleged agreement was not entered into and was not binding they should answer the first issue in the negative. It appears, then, that the judge, through an inadvertence no doubt, gave antagonistic instructions in reference to one legal proposition. In *Edwards v. R. R.*, 132 N. C., 99, the Court said: "It is well settled that when there are conflicting instructions upon a material point a new trial must be granted, as the jury are not supposed to be able to determine when the judge states the law correctly and when incorrectly." And in *Williams v. Haid*, 118 N. C., 481: "It does not help the case to say that, although a part of the charge is erroneous, there is another part of the charge on the same point which is correct, and that as a whole there is no error because the jury would be presumed to have obeyed the correct portion. That is to assume that the jury understands the law and is able to detect and discard the erroneous instruction, which would not be a safe assumption." *Elliott v. R. R.*, 115 N. C., 663; *Bragaw v. Supreme Lodge*, 124 N. C., 154; *Crosier v. Asheville*, 134 N. C., 311; *Jones v. Ins. Co.*, 151 N. C., 53; *McWhirter v. McWhirter*, 155 N. C., 145; *Champion v. Daniel*, 170 N. C., 331; *Haggard v. Mitchell*, 180 N. C., 255.

New trial.

A. S. MIDYETTE v. FARMERS MANUFACTURING COMPANY.

(Filed 16 September, 1925.)

APPEAL by defendant from judgment rendered at April Term, 1925, of Superior Court of CURRITUCK. *Cranmer, J.* No error.

Action to recover damages for the destruction of plaintiff's nets, alleged to have been burned by fire, negligently set out by defendant. From judgment upon verdict, in favor of plaintiff, defendant appealed.

Ehringhaus & Hall for plaintiff.
Aydlett & Simpson for defendant.

PER CURIAM. Assignment of error chiefly relied upon by defendant, upon its appeal to this Court, is the refusal of the court to allow its motion for judgment as of nonsuit, at the close of plaintiff's evidence; C. S., 567. No evidence was offered by defendant. There was sufficient evidence to sustain the allegations of plaintiff. This assignment of error cannot be sustained.

Assignments of error based upon exceptions to evidence offered by plaintiff, and upon exceptions to the charge of the court are not sustained. The judgment must be affirmed. We find

No error.

TIDEWATER BANK & TRUST COMPANY AND METROPOLITAN BANK & TRUST COMPANY v. CATHERINE W. BROWN, W. H. HOLLAND, F. M. W. BUTLER AND J. R. FLEMING.

(Filed 16 September, 1925.)

APPEAL by plaintiffs from *Cranmer, J.*, at December Term, 1924, of PASQUOTANK.

Plaintiffs brought suit to recover judgment on a promissory note for $1,739.00 executed by Catherine W. Brown and endorsed by her co-defendants. Pleadings were duly filed, and at the trial the following verdict was returned:

1. Is the plaintiff the owner and holder of the note in due course? Answer: Yes, owner, but not holder in due course.

2. Was the execution and delivery of the note by maker and endorsers obtained by fraudulent misrepresentations of the agent of the payee as alleged in the answer? Answer: Yes.

3. In what sum, if any, are the defendants indebted to the plaintiff? Answer: .....

Aydlett & Simpson for plaintiff.
W. L. Small and Ehringhaus & Hall for defendant.

PER CURIAM. This case has been tried in substantial compliance with the law which is applicable, and the record presents no satisfactory reason for disturbing the verdict.

No error.

STATE v. JOHN FLOOD.

(Filed 16 September, 1925.)

APPEAL by defendant from *Sinclair, J.*, at March Term, 1925, of the Superior Court of EDGECOMBE.

The defendant was convicted of a breach of the prohibition law and from the judgment he appealed.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

PER CURIAM. The defendant in apt time moved to set aside the verdict on the ground of newly discovered evidence. His Honor heard oral testimony not available to the defendant at the trial and in his discretion denied the motion. In this, we find no error. The motion, of course, cannot be entertained in this Court. *S. v. Jenkins,* 182 N. C., 818. The demurrer to the evidence and the motion to vacate the verdict on the ground that the State's evidence was insufficient were properly overruled. There are no other assignments of error.

No error.

TIDEWATER BANK & TRUST COMPANY AND METROPOLITAN BANK & TRUST COMPANY v. CATHERINE W. BROWN AND CATHERINE W. BROWN, AS ADMINISTRATRIX OF C. W. BROWN.

(Filed 16 September, 1925.)

APPEAL by plaintiffs from *Cranmer, J.*, at January Term, 1925, of PASQUOTANK.

Plaintiffs brought suit on a promissory note for $2,700.00 executed to the Tidewater Bank & Trust Company by Catherine W. Brown and her

husband, C. W. Brown, who died in 1921. The defendants pleaded usury and a forfeiture of interest under C. S., 2306. The verdict was as follows:

1. In what sum, if any, are the defendants indebted to the plaintiffs? Answer: $2,700.00, without interest.

Aydlett & Simpson for plaintiffs.
W. L. Small and Ehringhaus & Hall for defendant.

PER CURIAM. Finding no error we must overrule the plaintiffs' exceptions.

No error.

E. W. ADDISON v. NORFOLK SOUTHERN RAILROAD COMPANY.

(Filed 16 September, 1925.)

APPEAL by defendant from *Cranmer, J.*, at April Term, 1925, of CURRITUCK.

Civil action to recover damages for an alleged negligent injury and killing of plaintiff's livestock and turkeys by defendant's engines and cars.

From a verdict and judgment in favor of plaintiff, the defendant appeals, assigning errors.

W. L. Small for plaintiff.
Thompson & Wilson for defendant.

PER CURIAM. The controversy on trial narrowed itself to issues of fact, which the jury alone could determine. A careful perusal of the record leaves us with the impression that the case has been heard and determined substantially in agreement with the law bearing on the subject, and that the validity of the trial should be sustained. All matters in dispute have been settled by the verdict, and no action or ruling on the part of the trial court has been discovered by us which we apprehend should be held for reversible error.

His Honor properly ruled that the expression "any cattle or other livestock," as used in C. S., 3482, was not applicable to turkeys or other fowls. *James v. R. R.*, 166 N. C., 572.

The verdict and judgment will be upheld.

No error.

J. H. GURGANUS v. GREENVILLE MANUFACTURING COMPANY ET AL.

(Filed 16 September, 1925.)

APPEAL by named defendant from EDGECOMBE Superior Court. *Cranmer, J.*

Action by plaintiff against defendants to recover on an express contract to haul green and dry lumber. From a verdict and judgment for plaintiff the named defendant appeals. No error.

This case was heard by this Court on a former appeal, and is reported in 189 N. C., 202.

Henry C. Bourne for plaintiff.
George M. Fountain for defendant.

PER CURIAM. This case has been tried in accordance with the views of this Court, as expressed in the former appeal, *Gurganus v. Mfg. Co.*, 189 N. C., 202, and the well settled rules of law; hence, there is

No error.

STATE v. WILLIAM HORTON AND OSCAR HORTON.

(Filed 16 September, 1925.)

APPEAL by defendants from *Cranmer, J.*, at March Term, 1925, of GATES.

Criminal prosecution, tried upon an indictment, charging the defendants with violations of the prohibition law.

From an adverse verdict and judgment pronounced thereon, the defendants appeal, assigning errors.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.
Bridger & Eley for defendants.

PER CURIAM. The evidence is plenary and conflicting on the issues of defendants' guilt; it is purely a question of fact; the jury has resolved the matter against the defendants; there is no reversible error appearing on the record; the verdict and judgments will be upheld.

No error.

D. O. BRINKLEY ET AL v. Z. V. NORMAN ET AL.

(Filed 16 September, 1925.)

APPEAL by defendants from an order of *Sinclair, J.*, made at chambers on 16 June, 1925, continuing a restraining order to the final hearing.

The congregation of New Chapel Baptist Church undertook to build a new church building in Plymouth. The trustees from time to time borrowed money from the plaintiffs and secured the loans by mortgages or deeds of trust on the church property. They also contracted with Getsinger and others for lumber, cement, brick, electrical equipment and other material to be used in the construction of the building. Pleadings were filed and controverted issues of fact were raised.

W. L. Whitley for plaintiffs.
Zeb Vance Norman for defendants.

PER CURIAM. This appeal is controlled by the principle announced in *Seip v. Wright,* 173 N. C., 14, and in many other cases: "Where it will not harm the defendant to continue the injunction and may cause great injury to the plaintiff, if it is dissolved, the court generally will restrain the party until the final hearing."

The judgment is

Affirmed.

W. R. FOUNTAIN AND WIFE v. THE CITY OF ROCKY MOUNT.

(Filed 16 September, 1925.)

APPEAL by plaintiffs from *Sinclair, J.*, at June Term, 1925, of EDGECOMBE.

Civil action to recover damages for an alleged negligent injury to *feme* plaintiff, caused by the escaping of carbon monoxide from a kitchen range, water heater and tank, installed by agents of the defendant in plaintiffs' home and heated by gas purchased from the municipality owned and operated Rocky Mount Gas Works.

From a verdict and judgment in favor of defendant, the plaintiffs appeal, assigning errors.

F. S. Spruill and George M. Fountain for plaintiffs.
L. V. Bassett, B. H. Thomas, T. T. Thorne and W. O. Howard for defendant.

PER CURIAM. Plaintiffs have abandoned all their exceptions and assignments of error appearing on the record and rely entirely upon their motion for a new trial on the ground of newly discovered evidence. It is alleged in the motion, seasonably lodged for the purpose, that the information which the plaintiffs consider material and vitally important, came to their knowledge and attention after the term of court at which the case was tried had adjourned, and after the appeal had been docketed here. *Allen v. Gooding,* 174 N. C., 271. The motion is supported by affidavit, and the defendant has filed quite a number in reply. From a careful scrutiny and examination of the pertinent affidavits, filed by both sides, we are of opinion that the motion must be overruled. The showing made by plaintiffs falls short of the requirements laid down in *Johnson v. R. R.,* 163 N. C., p. 453. The motion, therefore, for a new trial, upon the ground stated, is denied.

No error.

THE UNITED COMMERCIAL BANK v. W. B. WATTS, FLORENCE H. WATTS AND L. M. HAMPTON.

(Filed 16 September, 1925.)

APPEAL from *Barnhill, J.,* by Mrs. L. M. Hampton, July Term, 1925, of WASHINGTON. Affirmed.

Zeb Vance Norman and Ward & Grimes for plaintiff.
W. L. Whitley and McMullan & LeRoy for Mrs. L. M. Hampton.

PER CURIAM. From a careful reading of the record, briefs and examination of authorities, we think the judgment of the court below correct, as follows:

"Upon a consideration of the pleadings and after hearing argument of counsel, the court is of the opinion and so holds that the matter set out in defendant's further answer being noted a counterclaim, is in fact a matter in defense, and not a counterclaim, and that the plaintiffs were not required by law to reply thereto.

"It is therefore ordered, considered and adjudged that the judgment of the clerk refusing to sign said judgment by default final in favor of the defendant, L. M. Hampton upon her alleged counterclaim, be and the same is hereby in all respects affirmed, and it is adjudged that the said defendant is not entitled thereto upon the pleadings."

Affirmed.

O. Z. EASON ET AL. v. J. W. JONES, COMMISSIONER IN THE MATTER OF O. Z. EASON ET AL. v. MALCOM EASON.

(Filed 23 September, 1925.)

APPEAL by defendant from JOHNSTON Superior Court. *Bond, J.*

Special proceeding, for the sale of land for partition pending in the Superior Court of Johnston County. Plaintiff alleges that the clerk made an allowance to the commissioner appointed to sell the land far in excess of that allowed by law, and alleges that defendant unlawfully retained proceeds of the sale, and let it pass through his hands as assets of the estate upon which he had administered, the same being retained in addition to the sum allowed by the clerk as commissioner's fees and taxed in the bill of cost, in accordance with C. S., vol. III, 766(a). From a judgment reversing the order of the clerk, the defendant appealed.

Harry P. Johnson, Leon G. Stevens for plaintiff.
R. L. Ray for defendant.

PER CURIAM. This is purely a question of fact, and upon the evidence the court below has determined what the facts are. The judgment of the court below must be

Affirmed.

WILLIE MCNAIR v. NORFOLK SOUTHERN RAILROAD CO.

(Filed 23 September, 1925.)

APPEAL by plaintiff from *Sinclair, J.*, at January Term, 1925, of WASHINGTON.

Civil action to recover damages for an alleged negligent injury and killing of plaintiff's livestock (mule) by defendant's engine and cars.

From a verdict and judgment for defendant, the plaintiff appeals, assigning errors.

P. H. Bell for plaintiff.
Z. V. Norman, Small, MacLean & Rodman for defendant.

PER CURIAM. The evidence is conflicting on the main issue of liability; it is purely a question of fact; the jury has determined the matter

against the plaintiff; there is no reversible error appearing on the record; the instruction in regard to the "prima facie evidence of negligence," arising under C. S., 3482, where suit is brought within six months after the cause of action accrued, when considered in connection with other portions of the charge, must be resolved in favor of the validity of the trial; the verdict and judgment will be upheld.

No error.

MARVIN WADE COMPANY v. H. V. STEWART.

(Filed 23 September, 1925.)

APPEAL by defendant from *Bond, J.,* at Lillington, N. C., 18 May, 1925, from HARNETT.

Motion of defendant to set aside judgment, rendered in this cause at the March Special Term, 1925, on the ground that said judgment was taken, not only irregularly, but also through surprise and excusable neglect. Motion denied and defendant appeals.

C. C. Parker and Clifford & Townsend for plaintiff.
C. L. Guy and H. L. Godwin for defendant.

PER CURIAM. The defendant failed to make good his allegation that the judgment, rendered in this cause, had been taken through surprise or excusable neglect. The judge finds the contrary to be true. It is also found as a fact that the defendant has no meritorious defense to the plaintiff's suit. Hence, the motion was properly denied on both grounds. *Livestock Co. v. Atkinson,* 189 N. C., 250; *Duffer v. Brunson,* 188 N. C., 789; *Bartholomew v. Parrish, ante,* 151.

Affirmed.

J. J. FEREBEE v. NORFOLK SOUTHERN RAILROAD CO.

(Filed 23 September, 1925.)

APPEAL by defendant from *Cranmer, J.,* at April Term, 1925, of CURRITUCK.

Civil action to recover damages for an alleged negligent injury and killing of plaintiff's livestock by defendant's engines and cars.

From a verdict and judgment for plaintiff, the defendant appeals, assigning errors.

Aydlett & Simpson for plaintiff.
Thompson & Wilson for defendant.

PER CURIAM. The evidence is conflicting on the main issue of liability; it is purely a question of fact; the jury has determined the matter against the defendant; there is no reversible error appearing on the record; the instruction on the burden of proof, when taken as a whole, must be resolved in favor of the validity of the trial; the verdict and judgment will be upheld.

No error.

GLADYS TAYLOR, BY HER NEXT FRIEND, ROLAND TAYLOR, v. GEORGE G. TAYLOR, M. E. BELL AND MINNIE HOLLAND, ADMINISTRATRIX OF O. L. HOLLAND, DECEASED.

(Filed 30 September, 1925.)

APPEAL by defendant from CARTERET Superior Court. *Barnhill, J.*

Action in behalf of Gladys Taylor, an infant, to recover damages for personal injury suffered on account of defendants' negligence in the operation of a cotton gin. Upon a verdict a judgment was rendered in favor of plaintiff. No error.

Alvah L. Hamilton, C. R. Wheatly and Luther Hamilton for plaintiff.
Ward & Ward and Julius F. Duncan for defendants.

PER CURIAM. This case was tried carefully and correctly. No error appears to defendants' prejudice. The doctrines laid down in *Fry v. Utilities Co.*, 183 N. C., 288; *Ferrell v. Cotton Mills*, 157 N. C., 536; *Graham v. Power Co.*, 189 N. C., 381, were in all respects followed by the learned and careful trial judge. There is

No error.

IN THE MATTER OF THE WILL OF FLORENCE FELTON GUTHRIE, DECEASED.

(Filed 30 September, 1925.)

APPEAL by caveator from *Barnhill, J.*, at January Term, 1925, of CARTERET. No error.

Caveat filed by James W. Guthrie, husband of deceased, to paper-writing propounded as the last will and testament of Florence Felton

Guthrie. Upon appropriate issues, there was a verdict that the execution of the paper-writing was not procured by undue influence; that deceased had mental capacity, at date of execution of same, sufficient to make a valid will; and that the paper-writing propounded, and every part thereof, was the last will and testament of Mrs. Florence Felton Guthrie. From judgment upon this verdict, caveator appealed.

Luther Hamilton for propounders.
A. B. Morris and Ward & Ward for caveator.

PER CURIAM. We find no error in the rulings of the court upon the admission or rejection of evidence, or in instructions given to the jury in the charge of the court. Both are sustained by the decisions of this Court. The exceptions were not well taken; assignments of error based thereon are not sustained.

We note the suggestion in the brief of counsel for caveator relative to the issues submitted. He expressed the opinion that only one issue should be submitted in a proceeding for the probate of a will in solemn form. However, there were no exceptions to the issues as submitted in this case. This Court has approved these issues, and no reason appears to us why the issues approved in the *Herring Will Case,* 152 N. C., 258, are not proper, when undue influence and want of mental capacity are relied upon by a caveator. There is

No error.

B. T. POLLOCK v. CARRIE KINSEY, CARRIE KINSEY, ADMINISTRATRIX OF GUY T. KINSEY, AND CARRIE KINSEY, GUARDIAN OF CHILDREN OF GUY T. KINSEY.

(Filed 30 September, 1925.)

APPEAL by Carrie Kinsey, from *Barnhill, J.*, and a jury, April Term, 1925, of JONES. No error.

The issues submitted to the jury and their answers thereto were as follows:

"1. Did the plaintiff furnish merchandise to S. E. Garner and J. E. Lovitt during the year 1920, at the request and upon the promise of the defendant to pay therefor? Answer: Yes.

"2. If so, in what amount, if any, is the defendant indebted to the plaintiff? Answer: $1,313.26, with interest from 1 January, 1921."

The court below rendered judgment for plaintiff against Carrie Kinsey, exceptions and assignments of error were duly made by defendant, Carrie Kinsey, to the exclusion of certain evidence during the trial, the charge of the court and judgment, and she appealed to the Supreme Court.

J. K. Warren and Cowper, Whitaker & Allen for plaintiff.
Rouse & Rouse for defendant.

Per Curiam. We heard the oral arguments and read the record and the carefully prepared briefs of counsel. We think that the court below made no error in excluding the evidence, and the charge of the court below was in accordance with law. From the entire record we can find no prejudicial or reversible error. We think the case governed by the principle laid down in *Taylor v. Lee*, 187 N. C., p. 393, and cases cited.

No error.

D. C. McCOTTER v. NORFOLK SOUTHERN RAILROAD CO.

(Filed 30 September, 1925.)

Appeal by plaintiff from *Barnhill, J.*, at May Term, 1925, of Pamlico.

Civil action tried upon the following issue:

"Did the defendant negligently fail to furnish car fit and suitable for the transportation of the potatoes shipped by plaintiff as alleged in the complaint? Answer: No."

From a judgment on the verdict in favor of defendant, the plaintiff appeals, assigning errors.

Z. V. Rawls for plaintiff.
Moore & Dunn for defendant.

Per Curiam. The evidence is conflicting on the main issue of liability; it is solely a question of fact; the jury has determined the matter against the plaintiff; there is no reversible error appearing on the record; the exceptions relating to the exclusion of evidence, and the one to the charge, must be resolved in favor of the validity of the trial; the verdict and judgment will be upheld.

No error.

STATE v. CLAUDE E. WILLIE AND JAMES O. WILLIE.

(Filed 30 September, 1925.)

APPEAL by defendants from *Barnhill, J.*, at March Term, 1925, of JONES. No error.

The defendants were indicted for an assault with a deadly weapon with intent to kill and the infliction of serious injury not resulting in death in breach of C. S., 4214. The jury returned for their verdict, "Guilty of an assault with a deadly weapon." From the judgment pronounced the defendants appealed.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

H. A. Tolson, D. H. Willis and Ward & Ward for the defendants.

PER CURIAM. The defendants entered of record a number of exceptions addressed to the admission and exclusion of evidence and the instructions given the jury. We have examined each of them and find no reversible error.

No error.

STATE v. WESTBROOK STRICKLAND.

(Filed 7 October, 1925.)

APPEAL by defendant from *Lyon, J.*, at May Term, 1925, of SAMPSON. No error.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

Fowler & Crumpler, C. L. Guy and J. F. Wilson for defendant.

PER CURIAM. In an indictment containing three counts the defendant was charged with the unlawful manufacture of intoxicating liquor in breach of C. S., vol. III, 3367 and 3411(b); with the unlawful possession of materials, substances, and property intended for use in breach of C. S., vol. III, 3411(d); and with the possession of intoxicating liquor for the purpose of sale in breach of C. S., 3379. The jury returned for its verdict: "Guilty in the manner and form charged in the indictment."

The assignments of error relate to the defendant's motion to dismiss the action as in case of nonsuit; and to the trial judge's failure to in-

struct the jury as to the defendant's contentions and as to the legal significance of aiding and abetting. Neither exception can be sustained. There was sufficient evidence to sustain the verdict, and the charge is not made a part of the record. There is a presumption that it was correct, and it is incumbent on the appellant to show error. The statute provides that the appellant shall cause to be prepared a concise statement of the case embodying the instructions of the judge if there be an exception thereto in order that the Court may examine into the legal sufficiency of the instruction excepted to.

No error.

PATRICK AYSCUE v. A. T. BARNES.

(Filed 7 October, 1925.)

APPEAL by defendant from *Devin, J.*, at June Term, 1925, of VANCE.

Civil action to recover damages for an alleged negligent injury caused by defendant's ambulance striking plaintiff, a pedestrian on a public highway, and resulting in serious damage.

Upon denial of liability, and issues joined, the jury returned the following verdict:

"1. Was the plaintiff injured by the negligence of the defendant or his agent? Answer: Yes.

"2. Did the plaintiff by his own negligence cause or contribute to his injury? Answer: No.

"3. What damages, if any, is the plaintiff entitled to recover? Answer: $2,000."

From a judgment on the verdict in favor of plaintiff, the defendant appeals, assigning errors.

Perry & Kittrell, T. T. Hicks & Son and A. A. Bunn for plaintiff.
Thomas M. Pittman and Kittrell & Kittrell for defendant.

PER CURIAM. The appeal presents no new question of law, or one not heretofore settled by our decisions. The evidence was conflicting on the issues of negligence and contributory negligence, resulting in a controversy which the jury alone could determine. They have resolved the disputed questions of fact against the defendant and in favor of the plaintiff. There is no reversible error appearing on the record. The exception relating to the judge's refusal to accept the verdict, as first

tendered by the jury, cannot be sustained. *Willoughby v. Threadgill,* 72 N. C., 438. The modification of defendant's special instructions was not only without prejudice, but entirely proper under the evidence in the case. The verdict and judgment must be upheld.

No error.

CHARLES F. DUNN v. JOHN H. DOVE, JESEPHER HURST, TOLSON JARMAN AND F. E. WALLACE, TRUSTEE.

(Filed 7 October, 1925.)

APPEAL by plaintiff from *Barnhill, J.,* at August Term, 1925, of LENOIR. Affirmed.

Charles F. Dunn for plaintiff.
F. E. Wallace and Cowper, Whitaker & Allen for defendant.

PER CURIAM. The principles of law involved in this case are practically the same as those in *Dunn v. McKnight, post,* 860. On the authority in that case, this case is

Affirmed.

CHARLES F. DUNN v. FRANK McKNIGHT.

(Filed 7 October, 1925.)

APPEAL by plaintiff from *Barnhill, J.,* at August Term, 1925, of LENOIR. Affirmed.

Charles F. Dunn for plaintiff.
Ely J. Perry and F. E. Wallace for defendant.

PER CURIAM. This was an action in ejectment to recover real property, brought by plaintiff against defendant. The summons and complaint were duly served on defendant, who filed answer and defense bond. Plaintiff made motion before the clerk to strike out answer and for judgment by default final. This motion was denied by the clerk, and plaintiff appealed to the Superior Court. The cause was duly transferred to the civil issue docket of the Superior Court at term for trial upon the issues raised by the pleadings.

The matters in controversy were heard after notice by defendant to plaintiff, at August Term, 1925, by his Honor, Barnhill, J., who found

all the facts entitling defendant to the judgment rendered. The presumption of law is that the finding of facts by the court below is based on competent evidence, and, ordinarily, this Court is bound by the findings.

We think, under all the facts and circumstances of this case, that the judgment of the court below should be

Affirmed.

COTTER-UNDERWOOD COMPANY v. W. D. WISE, BERRY WISE AND MOUNT OLIVE GROCERY & HARDWARE COMPANY, INTERVENOR.

(Filed 14 October, 1925.)

APPEAL by intervenor from judgment of Superior Court of JOHNSTON, September Term, 1924, *Barnhill, J.*, presiding. No error.

Plaintiff alleged in its complaint that as mortgagee, it was the owner of certain personal property described in a mortgage executed by defendants, W. D. Wise and Berry Wise. By virtue of a writ of claim and delivery issued in this action, the sheriff of Johnston County levied upon and seized said property, then in the possession of defendants. The Mount Olive Grocery and Hardware Company intervened in the action, alleging that it was the owner of said property by virtue of liens and mortgages executed by the defendants and recorded prior to the mortgage under which plaintiff claims. They gave the bond required by statute and thereupon the sheriff delivered the said property into its possession.

Upon the trial, the controversy between plaintiff and intervenor with respect to the ownership of said property was submitted to the jury upon the following issues:

First: "Is the intervenor, Mount Olive Grocery and Hardware Company, the owner and entitled to the possession of the property seized under claim and delivery proceedings issued in this cause?"

Second: "What was the value of the property seized or of the proceeds thereof received by the intervenor?"

Other issues relevant to plaintiff's action against defendants were submitted and answered in favor of plaintiff. The jury having answered the first issue "Yes" and second "$218.99," judgment was rendered in favor of plaintiff and against intervenor. From this judgment intervenor appealed.

Ed S. Abell for plaintiff.

J. Faison Thompson for intervenor.

PER CURIAM. At the close of all the evidence, intervenor moved for judgment. The motion was denied and intervenor excepted. There was no error in denying the motion. The mortgages under which intervenor claimed the property seized by the sheriff and delivered by him to intervenor, were registered prior to the registration of the mortgages under which plaintiff claimed. The burden, however, was upon the intervenor to offer evidence from which the jury could find by its greater weight that the property seized by the sheriff was the same as that conveyed in the mortgage from defendants to intervenor. That was a question for the jury to determine. The court properly submitted this question to the jury in its charge to which there was no exception.

There was no error in signing the judgment from which intervenor appealed. The judgment was in accordance with the verdict and with admissions made during the trial. Defendants have not appealed from the judgment and do not seem to have been present or represented by counsel at the trial. If the property seized by the sheriff was not subject to the lien executed by the defendants to the intervenor, it is not clear how the jury could have found that defendants falsely represented to the plaintiff at the time of the execution of the mortgage and notes set out in the complaint that there was no other claim on the property conveyed in the mortgage to plaintiff. The jury have found that the representation was not false in fact. This, however, is not presented upon the record and the judgment rendered in favor of the plaintiff and against the intervenor must be affirmed. There is

No error.

STATE v. LAURA JACKSON.

(Filed 14 October, 1925.)

APPEAL by defendant from WAKE. *Dunn, J.*

Indictment against the defendant, under C. S., 4358. From a judgment rendered on a verdict of guilty, defendant appealed. No error.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

F. T. Bennett for defendant.

PER CURIAM. The evidence was submitted to the jury and there were no objections, except to the competency of the evidence as to reputation. This evidence was certainly competent, as held in *S. v. Price,* 175 N. C., 804. Whether this evidence is supporting evidence or substantive evi-

dence of the allegations in the bill of indictment, is not presented, since there was no request to limit the purposes for which it might be considered. The sufficiency of the evidence to support a verdict against the defendant, not having been raised in the court below in any of the accepted ways, cannot be raised here for the first time. This question must be raised before verdict. *S. v. Hart,* 116 N. C., 976; *S. v. Kiger,* 115 N. C., 746; *S. v. Varner,* 115 N. C., 744; *S. v. Braddy,* 104 N. C., 737.

The exceptions for failure to charge the jury upon a given aspect of the evidence is not error when no written request is made in apt time. *S. v. Hart, supra.*

There is

No error.

HARVEY BONEY v. BANK OF ROSE HILL.

(Filed 14 October, 1925.)

APPEAL by defendant from *Devin, J.,* at January Term, 1924, of DUPLIN. No error.

During the year 1921 plaintiff was a depositor of defendant bank. From time to time he made deposits in and drew checks on said bank. These checks were paid by defendant and charged to plaintiff's account. He alleges that the balance due him on said account was $2,841.50; that he has demanded of defendant payment of this sum and that defendant has refused to pay the same. Defendant denies that there is any sum due plaintiff as balance on his account.

The controversy involves certain checks which defendant paid and charged to plaintiff's account. These checks were signed "Harvey Boney, J. A. B." Plaintiff contends that he did not sign or authorize any one else to sign these checks and that defendant is not entitled to credit for same. Defendant contends that the sums paid for these checks were proper credit on its account with plaintiff.

Plaintiff offered evidence tending to sustain his contention. Defendant offered no evidence. Upon the verdict, judgment was rendered that plaintiff recover of defendant the sum of $2,841.50 with interest from 15 November, 1923, and costs. From this judgment defendant appealed, assigning errors in the admission of testimony and in instructions to the jury.

Stevens, Beasley & Stevens for plaintiff.

O. B. Turner and Ward & Ward for defendant.

PER CURIAM. Statement of the account between plaintiff and defendant, furnished to plaintiff by defendant, were competent evidence upon the trial of the issue; exceptions to the admission of such statements by defendant cannot be sustained. Defendant relied upon the checks which it had returned to plaintiff, with the statements, as credits on the account; its exceptions to the admission of these checks as evidence must therefore be overruled.

Assignments of error based upon exceptions to instructions given the jury by the court in its charge cannot be sustained. The burden of the issue was upon plaintiff but, when he had offered evidence showing the amount of the deposits and the balance due after crediting defendant with checks which plaintiff admitted he had signed, it was incumbent on defendant to offer evidence that payments made on the checks in controversy were proper credits on the account. There was no error in charging the jury that if they found the facts to be as testified and as shown by the evidence, they should answer the issue, "$2,841.50 with interest from 15 November, 1923."

Since the docketing of this case in this Court, upon appeal, defendant has moved for a new trial upon newly discovered evidence. We have examined the affidavits filed in support of this motion with care. The checks in controversy were signed in plaintiff's name by J. A. Bannerman, at the time cashier of defendant bank. J. A. Bannerman thereafter became incapacitated, physically and mentally, and died before the trial of the action. The newly discovered evidence, as set out in the affidavits, tends to show that Bannerman made deposits to plaintiff's credit, in excess of the aggregate amount of the checks drawn by him in plaintiff's name and charged to the account. It fails to show, however, any authority from plaintiff to Bannerman to sign his name to checks on his account; nor does it show any relationship between plaintiff and Bannerman with respect to this account from which such authority could be found by a jury. The fact alone that Bannerman deposited funds to plaintiff's credit, notwithstanding the source of the funds, did not authorize him to check in plaintiff's name on the account; nor did it authorize defendant to pay said checks. It does not appear from the affidavits that upon a new trial of the issue, the evidence relied upon by defendant would establish Bannerman's authority to sign plaintiff's name to checks on his individual account. Defendant's situation with respect to these checks is unfortunate, but the evidence discovered since the trial is not such as to entitle defendant to a new trial under the rules of this Court. *Johnson v. R. R.*, 163 N. C., 454; *Manuel v. R. R.*, 188 N. C., 559. The motion must be denied. There is

No error.

C. G. WOOD v. G. M. RAYNOR ET AL.

(Filed 14 October, 1925.)

The defendant, N. L. Alcocke, appealed from an order of *Daniels, J.*, overruling a demurrer to the complaint. From FRANKLIN. Affirmed.

B. T. Holden and W. H. Yarborough for appellee.
Joseph B. Ramsey and John Kerr, Jr., for appellant.

PER CURIAM. The appellant demurred on the ground (1) that two causes of action have been improperly united in the complaint; (2) that the two alleged causes of action are not separately stated; (3) that the complaint does not state facts sufficient to constitute either cause of action; (4) that there is a defect of parties defendant; (5) that there is an action pending between Annie E. Fuller and C. G. Wood over the land in controversy.

In the light of numerous decisions of the Court we think his Honor was correct in overruling the demurrer. The judgment is therefore

Affirmed.

M. A. GARDNER AND J. J. MITCHELL v. L. M. WARING.

(Filed 14 October, 1925.)

APPEAL from *Daniels, J.*, at April Term, 1925, of WAKE. Affirmed.

This was a motion made by defendant, L. M. Waring, to set aside the judgment rendered against him 12 May, 1924. So much of the judgment rendered against him for the money demand is not resisted, but the following judgment by default as to fraud is asked to be set aside, viz.: "It further appearing that the plaintiffs have alleged in their complaint that the defendant obtained from them certain property, to wit, shipments of cattle and hogs by false and fraudulent representations, and the indebtedness claimed by the plaintiffs was incurred in that way. It is therefore adjudged that the plaintiffs are entitled to, and they should have, judgment by default and inquiry as to said allegations as to false and fraudulent representations, and it is so adjudged, and that said inquiry shall be held at the next succeeding term of this court."

Jones & Jones and J. W. Bailey for plaintiffs.
Douglass & Douglass and Jones, Jones & Horton for defendant.

PER CURIAM. We have heard the arguments, read the record and briefs with care, and can find no prejudicial or reversible error. There was sufficient competent evidence to support the material findings of fact by the learned judge in the court below who heard this motion. Upon the findings of fact, which we are bound by, we think the judgment of the court below correct. There is no new or novel principle of law involved in the controversy. The judgment of the court below is

Affirmed.

STATE v. C. N. RICHARDSON.

(Filed 14 October, 1925.)

APPEAL by defendant from *Daniels, J.*, at May Term, 1925, of WAKE.

Criminal prosecution tried upon an indictment charging the defendant with violating the provisions of C. S., 4358, against prostitution, aiding and abetting therein, and operating a place or building for such purposes.

From an adverse verdict and judgment of 20 months on the roads, the defendant appeals, assigning errors.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

F. T. Bennett for defendant.

PER CURIAM. The evidence is conflicting on the issue of guilt; it is purely a question of fact; the jury has determined the matter against the defendant; there is no reversible error appearing on the record; the exceptions relating to the alleged insufficiency of the evidence, and the one to the charge, must be resolved in favor of the validity of the trial; the verdict and judgment will be upheld.

No error.

MARY A. BUMP v. CITY OF WILMINGTON.

(Filed 21 October, 1925.)

From *Dunn, J.*, at March Term, 1925, of NEW HANOVER.

Action by plaintiff to recover damages of the defendant on account of personal injuries on account of negligence of the defendant in its

failure to maintain its sidewalks in proper condition. Judgment was rendered upon a jury verdict in favor of the plaintiff in the sum of $2,500.

Defendant assigned error (a) in rejecting the evidence of one Quinlivan, who testified that he had examined the *locus in quo* two days before the trial; and (b) in declining to submit the issue of contributory negligence tendered by the defendant; and (c) in reciting plaintiff's contentions, as to her injuries, in the language used by plaintiff as a witness; and (d) in declining defendant's motion to set aside the verdict.

Herbert McClammy for plaintiff.
K. O. Burgwin for defendant.

PER CURIAM. An examination of the record satisfies us that the trial court committed no prejudicial error in rejecting the evidence of Quinlivan, for that it appeared that the *locus in quo* had been repaired since the injury and before the examination by the witness.

There was no evidence to support the issue of contributory negligence. The court is not required by statute to give the contentions of the parties. We are of the opinion that, in the instant case, no prejudicial error resulted in reciting the contentions of plaintiff in her exact language. There was ample evidence to support the verdict. Therefore, we hold that there is

No error.

AMERICAN NATIONAL BANK v. M. L. STARKEY AND JOSEPH S. GOLDBERG.

(Filed 21 October, 1925.)

APPEAL by defendants from *Dunn, J.*, at April Term, 1925, of NEW HANOVER. No error.

John D. Bellamy & Sons for plaintiff.
Herbert McClammy for defendants.

PER CURIAM. On 22 November, 1922, the defendants executed a negotiable promissory note in the sum of $900 payable to the order of the Commercial National Bank of Wilmington. The plaintiff alleged that the note had been signed and endorsed by the defendants and that the Commercial National Bank for value received had sold and transferred the note before maturity to the plaintiff. The defendants denied these allegations and pleaded fraud in procuring the execution of the note; but admitted that it has not been paid.

Upon proper issues the jury found that the execution of the note had been procured from the defendants by false and fraudulent representations; that the plaintiff is a holder in due course; and that the defendants are indebted to plaintiff in the sum of $900 with interest from 21 January, 1923. Judgment was given for the plaintiff and the defendants excepted and appealed.

We find no error which entitles the defendants to a new trial. If the plaintiff became a holder in due course, as the verdict determines, it took the note free and discharged of the defendants' equities; and the controversy upon this question was fairly presented to the jury. The exceptions do not disclose good cause for a new trial.

No error.

STATE v. JOHN ARCH THOMPSON.

(Filed 28 October, 1925.)

APPEAL from *Calvert, J.*, and a jury, at March Term, 1925, of ORANGE. No error.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

Gattis & Gattis for defendant.

PER CURIAM. The defendant was found guilty by the jury of aiding and abetting in the manufacture of liquor. We think the evidence objected to competent. We think there was some evidence sufficient to be submitted to the jury—the probative force was for the jury. *S. v. Killian,* 178 N. C., p. 753. We see no prejudicial or reversible error in the record.

No error.

J. HERBERT BATE COMPANY v. J. N. BRYANT.

(Filed 28 October, 1925.)

APPEAL by defendant from *Dunn, J.*, at April Term, 1925, of NEW HANOVER.

Civil action tried upon the following issues:

"1. Is the defendant indebted to the plaintiff, and if so, in what amount? Answer: $1,350.82 with interest at 6% from 15 September, 1917.

"2. Is the plaintiff indebted to the defendant, and if so, in what amount? Answer: $140.86, with 6% interest from 15 March, 1917."

Judgment on the verdict in favor of plaintiff for the difference between the answers to the first and second issues, from which the defendant appeals, assigning errors.

George Rountree for plaintiff.
Herbert McClammy and K. O. Burgwin for defendant.

PER CURIAM. The remainder judgment for the difference between plaintiff's claim and defendant's counterclaim, is sanctioned by what is said in *Sewing Machine Co. v. Burger,* 181 N. C., 241.

The controversy on trial narrowed itself to issues of fact, which the jury alone could determine. The evidence was plenary and conflicting on both issues. There is no reversible error appearing on the record. The exceptions relating to the exclusion of evidence must be resolved in favor of the validity of the trial. The verdict and judgment will be upheld.

No error.

JOSEPH STOFFER v. W. H. GRIFFIN, TRADING AS ELECTRIK MAID BAKE SHOP.

(Filed 28 October, 1925.)

APPEAL from DURHAM Superior Court, *Calvert, J.*

Action by Joseph Stoffer against W. H. Griffin, trading as Electrik Maid Bake Shop. Judgment for plaintiff on a jury verdict and defendant appeals. No error.

Fuller & Fuller for plaintiff.
Brawley & Gnatt for defendant.

PER CURIAM. The verdict was as follows:

"1. What amount, if any, is the defendant due on his contract of 24 October, 1922? Answer: $2,750 with interest from 16 January, 1923.

"2. Is the plaintiff entitled to the possession of the property taken on claim and delivery? Answer: Yes.

"3. What was the reasonable market value of the property at the time it was taken on claim and delivery? Answer: $2,750.

"4. Did the plaintiff's assignor, the Electrik Maid Bake Shop, breach that part of the contract providing that it agreed 'to furnish said party of second part the services of its master baker for not exceeding two

weeks to break in the baker to be employed by the said second party and familiarize him with the use of said equipment? Answer: No.

"5. If so, what damage, if any, did the defendant sustain by reason of said breach of such contract? Answer: ....."

The defendant's exceptions relate to the competency of evidence pertaining to the third issue and to the contentions of the plaintiff as given to the jury in the charge.

The case was correctly tried, and the controversy on the third issue was wholly within the domain of fact, and that has been determined by the jury in a trial free from prejudicial error.

Let it be certified that there is

No error.

J. H. ALLEN v. C. C. ARMFIELD.

(Filed 4 November, 1925.)

APPEAL by plaintiff from *Calvert, J.*, at March Term, 1925, of ALAMANCE.

At the close of the plaintiff's evidence, the defendant's motion for judgment of nonsuit was allowed. Reversed.

Carroll & Carroll for plaintiff.

Swink, Clement & Hutchins and Parker & Long for defendant.

PER CURIAM. The plaintiff alleged that in 1920 he rented land from the defendant for the purpose of cultivating a crop of tobacco and set out with particularity all the terms of the renting. He offered evidence in support of his allegations; but on the cross-examination in answer to the question whether he understood the defendant had charge of the land and rented it as administrator he said, "That is what everybody told me—to go to him; everybody told me he had charge of it as administrator and was renting it as such." This testimony, we presume, led his Honor to the conclusion that the plaintiff could not prevail because he had contracted with the defendant in his representative capacity and had sought to enforce against him a personal liability. In this, there was error. As administrator, the defendant had no control over the land, and if acting as an agent he made no disclosure of his principal. Besides, a personal representative is not answerable in his official character for a cause of action not created by the decedent. As the Court said in *Whisnant v. Price*, 175 N. C., 611, the uniform rule is that no action will lie against the personal representative of a deceased person except

upon some claim which existed against the deceased in his lifetime and for a claim accruing wholly in the time of the administration, the administrator is liable only in his personal character. *Snipes v. Monds, ante,* 190.

The judgment is

Reversed.

E. A. McNEILL v. CALLAHAN CONSTRUCTION COMPANY.

(Filed 4 November, 1925.)

Appeal by defendant from *Finley, J.,* at July Term, 1925, of Ashe. No error.

T. C. Bowie for plaintiff.

W. R. Bauguess for defendant.

Per Curiam. We have given the appellant's exceptions due consideration and find no error which entitles it to a new trial.

No error.

STATE v. C. T. NEAL.

(Filed 4 November, 1925.)

Appeal by defendant from *Schenck, J.,* at January Term, 1925, of Forsyth. No error.

Defendant was convicted upon indictment charging violation of C. S., 4250. From judgment that defendant be imprisoned in the county jail of Forsyth County for a term of eight months, to be worked upon the roads of said county, defendant appealed.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

W. T. Wilson for defendant.

Per Curiam. We have examined the twenty-four assignments of error relied upon by defendant upon his appeal to this Court. All are based upon exceptions to the admission or exclusion of evidence. There are no exceptions to the charge of the Court. The assignments of error cannot be sustained. The evidence submitted to the jury is ample to support the verdict. The judgment is affirmed. There is

No error.

CHAS. T. HAMBY v. LEE A. ALLMAN ET AL.

(Filed 12 November, 1925.)

APPEAL by defendant from *Finley, J.*, at July Term, 1925, of ASHE.

Civil action tried upon the following issue:

"1. Is the defendant, the Callahan Construction Company, indebted to the plaintiff, and if so, in what sum? Answer: $62.28, with interest."

Judgment on the verdict for plaintiff, from which the defendant appeals, assigning errors.

T. C. Bowie for plaintiff.

W. R. Bauguess for defendant, Callahan Construction Company.

PER CURIAM. The controversy on trial narrowed itself to an issue of fact, which the jury alone could determine. A careful perusal of the record leaves us with the impression that the case has been heard and determined substantially in agreement with the law bearing on the subject, and that the validity of the trial should be sustained. All matters in dispute have been settled by the verdict, and no action or ruling on the part of the trial court has been discovered by us which we apprehend should be held for reversible error.

Plaintiff's right to recover is not precluded by the statute of frauds, under the jury's finding that the defendant was a principal debtor. *Taylor v. Lee,* 187 N. C., 393.

The verdict and judgment will be upheld.

No error.

ROSA THOMPSON v. CITY OF THOMASVILLE AND LASSITER & CO.

(Filed 12 November, 1925.)

APPEAL by defendant from *McElroy, J.*, at May Term, 1925, of DAVIDSON.

Walser & Walser and Z. I. Walser for plaintiff.

H. R. Kyser for defendant.

PER CURIAM. The plaintiff brought suit to recover damages for the appropriation for public purposes of a part of her lot in Thomasville. The defendants denied the material allegations of the complaint, and on the trial the following verdict was returned:

"1. Were the lands of the plaintiff taken and appropriated by the defendant, the city of Thomasville, for street purposes as alleged in the complaint? Answer: Yes.

"2. If so, what damages, if any, is the plaintiff entitled to recover? Answer: $650."

There was a judgment for the plaintiff against the city of Thomasville and the city appealed assigning error.

The defendants' exceptions to the evidence and to the court's refusal to give its prayers for instructions are untenable, and we find no reversible error in the instructions given.

No error.

JAMES C. DAVIS, AGENT OF THE UNITED STATES RAILROAD ADMINISTRATION, AND SEABOARD AIR LINE RAILWAY COMPANY v. HILTON LUMBER COMPANY.

(Filed 25 November, 1925.)

APPEAL by plaintiff from *Grady, J.*, at December Term, 1924, of NEW HANOVER.

Civil action to recover demurrage, unloading and storage charges, and war taxes incidental thereto, on three car loads of lumber loaded and tendered by defendant to plaintiff for shipment, same being refused. The defendant in its answer denied liability for said charges, and set up a counterclaim for damages for the wrongful sale and conversion of defendant's lumber on said cars.

The jury, responding to the issues submitted, found: (1) That the first car load of lumber, tendered by defendant to plaintiff for shipment, 18 March, 1918, destination Guenther's Siding, Philadelphia, was not offered in violation of a valid embargo then existing; (2) that the two car loads of lumber, tendered by defendant to plaintiff for shipment, 21 March, 1918, destination New York and Brooklyn, were not offered in violation of a valid embargo then existing; (3) that the plaintiff, Railroad Administration, wrongfully refused to issue bills of lading for said shipments; and (4) that the defendant was entitled to recover of the plaintiff the sum of $2,463.24, on account of the matters and things alleged in the answer.

From a judgment on the verdict in favor of defendant, the plaintiff appeals, assigning errors.

John D. Bellamy & Sons for plaintiff.
Bryan & Campbell for defendant.

PER CURIAM. Several serious exceptions have been entered on the record, but a careful perusal of the whole case leaves us with the impression that they should all be resolved in favor of the validity of the trial. Most of the questions, presently sought to be presented, were considered by us on a former appeal, 185 N. C., 227; and the court on the second trial, seems to have followed the law substantially as declared on the first appeal. We are not now permitted to review any question which was decided on the former appeal, as a party who loses in this Court may not have the case reheard by a second appeal. *Ray v. Veneer Co.,* 188 N. C., 414.

"A decision by the Supreme Court on a prior appeal constitutes the law of the case, both in subsequent proceedings in the trial court and on a subsequent appeal." *Harrington v. Rawls,* 136 N. C., 65. To like effect are numerous decisions in this and other jurisdictions. See Note, 34 L. R. A., 321. Speaking to the question in *Vann v. Edwards,* 135 N. C., p. 676, it was said that "the decision of a Court of final resort, upon a given state of facts, becomes the law of the case upon a second trial and another appeal in regard to those facts, if they are substantially the same as those upon which the former decision was made."

It would serve no useful purpose to consider the exceptions *seriatim,* as the law of the case was settled and discussed by us on the former appeal.

The verdict and judgment will be upheld.

No error.

CONNOR, J., did not sit.

CROWN RICHARDSON v. AMERICAN COTTON MILLS.

(Filed 25 November, 1925.)

APPEAL by defendant from *Francis D. Winston, Emergency Judge,* June Special Term, 1925, of GASTON. No error.

Henry L. Kyser and S. J. Durham for plaintiff.
Garland & Austin for defendant.

PER CURIAM. This case was here before and a new trial granted defendant. *Richardson v. Cotton Mills,* 189 N. C., p. 653. The principles of law applicable were clearly set forth in that case. From a careful perusal of the record, the judge below followed the law as laid down in the former case. The court, following the decision, defined "licensee"

and "fellow-servant," explained the distinction between the two and definitely instructed the jury as to the facts upon which Lainer would be deemed a licensee and as to those upon which he would be deemed a fellow-servant. The court below laid down the long established rule: "It is the duty of the master, in the exercise of ordinary or reasonable care, to furnish or provide his servant a reasonably safe and suitable place in which to work. This duty is primary and nondelegable." *Barnes v. Utility Co., ante,* 387; *Riggs v. Empire Mfg. Co., ante,* 256; *Thomas v. Lawrence,* 189 N. C., 521. The failure of the master in this duty, if the proximate cause of the injury, was properly presented to the jury.

We can find no prejudicial or reversible error in the record. Plaintiff recovered in the first action and a new trial was granted defendant for errors in law. In the present trial the court below followed the opinion heretofore written. The questions of fact were found against the defendant—this was in the province of the jury.

We can find

No error.

ASBESTOS TRADING AND FINANCE COMPANY, INC., v. L. V. BALLARD.

(Filed 2 December, 1925.)

Plaintiff appealed from MONTGOMERY Superior Court, *Shaw, J.*

Action to recover $217 with interest from 3 December, 1923, on trade acceptance for goods sold and delivered.

From a judgment in favor of the defendant, on a verdict, plaintiff appealed. No error.

Bogle & Bogle for plaintiff.
R. T. Poole for defendant.

PER CURIAM. The defendant denied that he executed the trade acceptance sued on. Plaintiff introduced evidence tending to show that the signature in the name of the defendant was in his hand-writing. Defendant denied that he signed it and offered evidence tending to show that it was not in his handwriting, and upon a proper charge as favorable to the plaintiff as it could obtain under the law, the jury has resolved this question of fact in favor of the defendant. There is no prejudicial error upon the record. Therefore, let it be certified that there is

No error.

STATE v. DAN A. MOORE.

(Filed 23 December, 1925.)

APPEAL by defendant from *Oglesby, J.*, at July Term, 1925, of MONTGOMERY. No error.

Defendant was tried upon indictment charging him with violation of the statute prohibiting the manufacture and sale of intoxicating liquor. From judgment upon verdict of guilty, defendant appealed.

Attorney-General Brummitt and Assistant Attorney-General Nash for the State.

Brittain, Brittain & Brittain for defendant.

PER CURIAM. The evidence in this case, to which there was no exception by defendant, was sufficient to support the verdict. We have examined the exceptions to the instructions to the jury, given in the charge of the court. Assignments of error based on these exceptions cannot be sustained. Defendant admitted that he was at the still when he was arrested by the officers, testifying that he had gone there at the invitation of a stranger whom he had met on the roadside, to get a drink. He ran when he saw the officers approaching. The officers testified that when they overtook defendant, he said, "Well, you have got me." While the officer was destroying the contents of the still, he testified that defendant said, "It is a pity to throw this stuff away; there isn't a grain of sugar in it." There was fire under the still; it had been recently operated. The jury evidently did not accept as true defendant's statement that he did not have a "bit of interest in the still." The charge of the court was correct and free from error. The judgment is affirmed. There is

No error.

PAULINE MULLINS, BY HER NEXT FRIEND, A. M. MULLINS, v. LOUISVILLE & NASHVILLE RAILROAD COMPANY.

(Filed 23 December, 1925.)

APPEAL by defendant from *Finley, J.*, at April Term, 1925, of CHEROKEE.

Action for damages for personal injury caused by the negligence of the defendant. Verdict and judgment for the plaintiff and appeal by the defendant upon exceptions noted in the record.

J. D. Mallonee and Moody & Moody for plaintiff.
M. W. Bell for defendant.

PER CURIAM. The plaintiff alleged that while in the act of descending from the platform of one of the defendant's cars her foot was caught by a piece of tin or sheet iron which extended along the top and edge of the platform and that she was thereby thrown to the ground and injured. She alleged also that the proximate cause of her injury was the negligence of the defendant in allowing the piece of metal to cup and project above the surface of the platform to which it was attached and in allowing the platform to become worn and unsafe.

During the trial the defendant entered of record several exceptions; but we have not discovered in any of them sufficient ground for a new trial. The case seems to have been determined in accordance with recognized principles of law. No prejudicial error having been shown, the judgment will not be disturbed.

No error.

TOM RICH v. ANDREWS MANUFACTURING COMPANY.

(Filed 23 December, 1925.)

APPEAL by defendant from *Finley, J.*, at June Term, 1925, of CHEROKEE.

Civil action brought by plaintiff, an employee of the defendant, to recover damages for an alleged negligent injury, sustained by plaintiff while discharging his duties as such employee.

Upon denial of liability and issues joined, there was a verdict and judgment in favor of plaintiff, from which the defendant appeals, assigning errors.

Dillard & Hill and D. H. Tillett for plaintiff.
Martin, Rollins & Wright and M. W. Bell for defendant.

PER CURIAM. The controversy on trial narrowed itself principally to issues of fact, which the jury alone could determine. The chief assignment of error, or the one most strongly urged on the argument and in the brief, is the one addressed to the refusal of the court to grant the defendant's motion for judgment as of nonsuit, made first at the close of plaintiff's evidence and renewed at the close of all the evidence. Viewing the evidence in its most favorable light for the plaintiff, the

accepted position on a motion of this kind, we think the trial court was justified in submitting the case to the jury, and that the verdict is fully warranted thereby.

No benefit would be derived from detailing the testimony of the several witnesses, as the principal question before us is whether it is sufficient to carry the case to the jury, and we think it is.

The charge is largely a recapitulation of the contentions of the parties; but taking it as a whole, we are constrained to believe that, on the facts of the present record, it is not a sufficient departure from the requirements of C. S., 564, to necessitate a new trial.

The verdict and judgment will be upheld.

No error.

G. M. FISH AND W. P. EVANS v. W. R. KILLIAN.

(Filed 23 December, 1925.)

APPEAL by defendant from *Finley, J.*, and a jury, January Term, 1925, HAYWOOD. No error.

The plaintiffs' action was originally brought in the nature of a processioning proceeding for the purpose of settling and locating the boundary line between plaintiffs and defendant.

The defendant, in his answer, claimed the land and denied that plaintiffs had any title. The case was tried out on the theory of an action of ejectment.

The issues submitted to the jury and their answers thereto were as follows:

"1. Is the plaintiff the owner and entitled to the possession of the land described in the complaint? Answer: Yes.

"2. Is the defendant in the wrongful possession of the said lands or any part thereof? Answer: Yes, 37 feet from center of railroad."

John M. Queen and Alley & Alley for plaintiff.
Smathers, Robinson & Cogburn for defendant.

PER CURIAM. From a careful reading of the record, we think the question of the ownership of the land was one of fact. The facts on both sides indicate to some extent "No man's land." On the whole, the evidence of plaintiff was sufficient to be submitted to the jury. From a critical examination of the assignments of error and the charge of the court below, we can find no prejudicial or reversible error.

No error.

J. M. SMITH AND WIFE, MINA SMITH, v. WHITMER-PARSONS PULP & LUMBER COMPANY, R. P. MOORE AND WILBURN PATRIQUIN.

(Filed 23 December, 1925.)

APPEAL by defendant Whitmer-Parsons Pulp & Lumber Company from SWAIN Superior Court. *Webb, J.*

Action for damages on account of negligence, and from a jury verdict in favor of the plaintiffs, the defendants, Whitmer-Parsons Pulp & Lumber Company, appeals. No error.

The plaintiffs, landowners in Ocona Lufty Township, owned a 40-acre tract of farm land located immediately and directly opposite the defendant's saw mill plant on Ocona Lufty River. The plaintiffs lived on their tract of land near the river, where they owned a residence, and certain other buildings, including a storehouse in which they conducted a mercantile business. The public highway ran immediately in front of plaintiffs' buildings and within some 25 feet of the waters of the river. The defendants owned the tract of land immediately opposite and across the river from plaintiffs' residence, and on its land it operated a saw mill and planing mill and had, among other things connected with its industrial plant, a place where it burned its refuse from its mill. This fire was fed by means of a conveyor which took the refuse matter up to a point above the fire from which it dropped and burned. The fire was enclosed on all sides except the open side next to plaintiffs' residence.

This action, as originally instituted, alleged a nuisance on account of this continual fire and the resultant falling of cinders and charred particles of wood on plaintiffs' premises and the scattering of soot thereon, so that plaintiffs' home was rendered less comfortable and their business interfered with and their property endangered on account of fire, and, from the alleged ill effects of a log pound and odors therefrom, but at the time of the trial, plaintiffs had sold their residential property, including their mercantile business and had moved therefrom.

The plaintiffs stated that they asked for nothing except damages to their real and personal property and the court eliminated the other features from the trial.

The court submitted the following issues:

"1. Were the plaintiffs the owners of the lands described in the complaint at the time of the institution of this action. Answer: Yes.

"2. Was the lands, houses and outbuildings of the plaintiffs damaged by the negligence of the defendant, between 1 March, 1924, and 1 November, 1924, as alleged in the complaint? Answer: Yes.

"3. If so, in what amount? Answer: $1,800.

"4. Was the personal property of the plaintiffs damaged by the negligence of the defendant, between 1 March and 1 November, 1924, as alleged in the complaint? Answer: Yes.

"5. If so, in what amount? Answer: $200.

W. G. Hall and Morgan & Ward for plaintiffs.

S. W. Black and Smathers, Robinson & Cogburn for defendant.

PER CURIAM. We have examined all the exceptions, and, upon perusal of the entire record, we are of opinion that there is no prejudicial error. The court below charged the principles of law applicable to the relevant facts, and we are of opinion that the charge is a sufficient compliance with C. S., 564. The evidence admitted was competent and there have been no errors committed in the trial prejudicial to the defendant. The plaintiffs contended that the defendants are liable for negligence, and the defendants contended that they are liable only in the case of negligence. We are of opinion that the case has been tried in accordance with the accepted theory of the parties, and the jury has settled the facts in a trial free from prejudicial error. Therefore, there is

No error.

APPEALS FROM SUPREME COURT OF NORTH CAROLINA

IN THE SUPREME COURT OF THE UNITED STATES

Interstate Cooperage Company and W. A. Buys v. Ronald S. Swain. Dismissed on motion of Petitioner, 5 October, 1925.

Seaboard Air Line Railway v. Louise E. Gerow, Admx., of Herbert W. Gerow. Petition for *certiorari* denied, 14 December, 1925.

Rhode Island Hospital Trust Company, Executor of George Briggs, deceased, v. Rufus A. Doughton, Commissioner of Revenue of the State of North Carolina. Judgment reversed, 1 March, 1926.

Atlantic Coast Line Railroad Company v. George L. Wimberly, Jr., Administrator. Petition for *certiorari* granted, 8 March, 1926.

Ida May Southwell, Administratrix of H. J. Southwell v. Atlantic Coast Line Railroad Company. On petition for writ of *certiorari*. Pending.

The Wachovia Bank & Trust Company, Administrator et al. v. R. A. Doughton, Commissioner of Revenue. Petition *certiorari* allowed. Pending.

REMARKS OF CHIEF JUSTICE STACY, ON BEHALF OF THE COURT, FROM THE BENCH, WEDNESDAY MORNING, 16 SEPTEMBER, 1925.

Before proceeding with the usual work of the Court, we pause to express the deep sense of personal sorrow, experienced by each one of us, and the profound appreciation which we have of the great loss that has come to the State and its people in the death of Judge William A. Hoke, formerly Chief Justice of this Court, and so recently resigned on account of the condition of his health.

Judge Hoke was not only a superb lawyer and splendid judge, but he was a noble spirit as well. It was his passion to deal justly with everyone. He believed in a gospel of justice, in a religion of morality and in the efficacy of instant reliance on a Greater Power. This was the real source of his strength and effectiveness. The lives of many have been enriched by the rare charm of his friendship, and, in the hearts of those who knew him best, his immortality will abide.

In all the duties and relationships of a long and useful life, he proved faithful to the uttermost, and we are well assured that there awaits for him the reward of the righteous.

AMENDMENTS TO RULES.

The following amendments shall be added to the rules:

3½. As a condition precedent to his right to apply for license, every applicant for license to practice law in this State, either under the Comity Act or by taking the prescribed examination, shall notify the clerk of his intention to become an applicant at least thirty days prior to the day of examination. Immediately upon receipt of such notice, the clerk shall furnish said applicant with blank forms for his certificates, as required by Rules 2 and 3. The names of those who have thus signified their intention of becoming applicants for license to practice law shall be open to inspection in the clerk's office during the thirty-day period prior to the examination.

This notice to the clerk is not in lieu of, but in addition to, the requirements relating to certificates of proficiency and good moral character; and as to these, the time for filing same shall be changed from "not later than noon of Friday preceding the day of examination" to "not later than noon of Tuesday preceding the day of examination."

3½ (a). Protest against the issuance of license in any case may be filed with the clerk on or before Saturday noon preceding the day of examination; and the applicant, so protested, shall be notified of such action immediately upon receipt of same, but the protest shall not be made public by the clerk unless and until said applicant shall have successfully passed the examination or met every other requirement necessary to the issuance of license. Any protested applicant may withdraw his application for license to practice law in this State at any time prior to tendering his paper for examination or his credentials for approval under the Comity Act, and, in which event, the protest will not be heard. But upon the tender of a satisfactory examination paper or satisfactory credentials under the Comity Act in the face of a protest, the matter then passes beyond the control of such applicant, and the Court will set a day for the hearing of said protest, first giving the protested applicant an opportunity to answer the charges preferred against him by issuing notices to all interested parties of the hearing.

Approved, 3 February, 1926.

BROGDEN, J.,
For the Court.

INDEX.

ABUSIVE LANGUAGE. See Courts, 6.

ACCEPTANCE. See Contracts, 15, 29, 47.

ACCOUNT. See Officers, 2.

ACT OF GOD. See Negligence, 23.

ACTIONS. See Claim and Delivery, 1; Deeds and Conveyances, 14, 22; Pleadings, 6; Banks and Banking, 3; Equity, 9; Carriers, 1, 2; Constitutional Law, 8; Official Bonds, 1; Divorce, 1; Principal and Agent, 3; Statutes, 11; Schools, 6; Contracts, 13, 18, 24, 49; Drainage Districts, 1.

1. *Actions—Parties—Corporations—Receivers.*—Where it appears in an action that the indebtedness sought to be recovered was claimed to be due a corporation, and that the suit was instituted by the individual stockholders, a judgment as of nonsuit is properly entered, though proceedings in dissolution of the corporation were being had, C. S., 1182, the proper party plaintiff being the corporation or a receiver appointed therefor. *Worthington v. Gilmers*, 128.

2. *Actions—Consolidation—Courts—Appeal and Error—Objections and Exceptions.*—The appealing party must except to the consolidation of causes by the judges of the Superior Court, to present the matter to the Supreme Court. *Fleming v. Holleman*, 449.

3. *Same—Prejudice.*—It must appear on appeal from the consolidation of causes of action by the trial judge that it was prejudicial against the appellant therefrom or that his rights were injuriously affected. *Ibid.*

4. *Actions—Torts—Debt—Fraud—Independent Actions.*—Where an action for debt has been prosecuted to final judgment, establishing the debt, an independent action in tort may thereafter be maintained for fixing the defendant with fraud in its procurement subsequently discovered by the plaintiff. *Machine Co. v. Owings*, 140 N. C., 503, cited and approved. *Bare v. Thacker*, 499.

5. *Actions—Consolidation—Banks and Banking—Loans—Statutes—Misdemeanors—Criminal Law.*—An indictment charging the officer of the bank of violating C. S., vol. III, 222(i), and also unlawfully making loans for the bank to certain persons in excess of the maximum percentage of the capital stock and permanent surplus, C. S., vol. III, 220(d), alleges the commission of crimes of the same class, where there are two indictments thereof against the same person, that may be consolidated and tried together by the court. *S. v. Cooper*, 528.

6. *Same—Officers.*—A bank must act through its officers, and where they have violated the provisions of C. S., vol. III, secs. 222(i) and 220(d) as to lending the bank's money, the offense is committed by the officers under the meaning of the statute, and they are individually indictable therefor. *Ibid.*

7. *Same—Capital and Surplus.*—The statute requiring a bank to keep as a reserve on hand, instantly avaliable, funds in an amount equal

ACTIONS—*Continued.*

to at least 15% of its aggregate demand deposits, etc., means all deposits the payment of which can be legally required within thirty days, C. S., vol. III, 216(a), this reserve consisting in cash on hand, balance payable on demand due from other approved solvent banks designated as depositors, C. S., vol. III, 220(g), by resolution of the board of directors approved by the Corporation Commission. C. S., vol. III, 221(g). *Ibid.*

8. *Same—Corporation Commission—Receivers.*—The Corporation Commission must require a bank that has not the surplus required by statute, to make it good, and upon its failure to do so within thirty days, may take possession of its property and business. C. S., vol. III, 222(i). *Ibid.*

9. *Same.*—The statutory limitation upon a bank making loans to any one person or class of common interests, does not apply to loans, or extensions or renewals thereof, existing at the date of the ratification of the statute, C. S., vol. III, 220(d), and under the later act, C. S., vol. III, 224(i), the unlawful act thus committed is made a misdemeanor, and is punishable as such at the discretion of the court. *Ibid.*

10. *Same—Intent—Pleadings—Evidence.*—A conviction may be had of a bank officer who violates the statutory inhibition as to making of loans, etc., and he may be convicted without allegation or evidence of an intent to defraud the bank, or others. *Ibid.*

11. *Actions—Claim and Delivery—Nonsuit—Independent Actions — Damages.*—Where the plaintiff has taken a voluntary nonsuit after the property had been taken in claim and delivery and therein sold, the defendant in that action may maintain an independent action for damages, against the plaintiff in the former action and the surety on his bond, given in conformity with C. S., 833, wherein nominal damages at least are recoverable, with actual damages for the value of the property at the time of the seizure under claim and delivery. *Davis v. Wallace*, 543.

12. *Same—Contracts—Breach—Principal and Surety—Bonds—Statutes.*—Where the plaintiff after claim and delivery and the sale therein of the property, has taken a voluntary nonsuit, in an independent action by the defendant against the principal therein and the surety on his bond, the question of the defendant's ownership is material only on the issue as to the measure of damages, the burden of proof being on the plaintiff in the second action, C. S., 580. *Ibid.*

13. *Same—Burden of Proof.*—Where the plaintiff in claim and delivery has taken a voluntary nonsuit after selling the property, the fact that the property was taken from the defendant's possession is evidence of his ownership, and in an independent action to recover damages against the plaintiff in the former action and the surety on the claim and delivery bond, the defendant in the former action was entitled to recover, nothing else appearing, the value of the property when taken, with interest, as damages for retention, and where the defendant alleges ownership, the burden is on him to prove it. *Ibid.*

14. *Same—Contracts—Breach.*—The failure of plaintiff to restore the property to defendant in claim and delivery, and to prosecute his action to final success, is a failure to perform the conditions that our statute

ACTIONS—*Continued.*

requires for the delivery of the property to him, and where he has taken a voluntary nonsuit in his action without performing these conditions, the defendant, in an independent action against the principal and surety on his bond, may have the matters determined. *Ibid.*

15. *Actions—Second Action on Same Subject-Matter—Motions—Dismissal—Courts—Jurisdiction.*—Where an action has been commenced by the issuance of a summons in the Superior Court of a county, an action thereafter commenced in a different county wherein the same or substantially the same subject-matter is involved, between the same parties, will be dismissed when the plaintiff in the second action may obtain adequate relief in the one first brought; or the court, *ex mero motu*, will dismiss the later action for want of jurisdiction. *Construction Co. v. Ice Co.*, 580.

16. *Actions—Tort-Feasors—Primary and Secondary Liability—Judgments—Statutes.*—The primary and secondary liability as between two joint *tort-feasors* should be adjusted in the same action, where there are two defendants sued for the same negligent act alleged in the complaint, and judgment in the consolidated cases accordingly may be rendered under our statute. C. S., 602. *Bowman v. Greensboro*, 611.

17. *Same—Demurrer.*—Where the plaintiff sues a city for its negligence in failing to remove a dangerous menace over its sidewalk, and the answer though denying negligence, sufficiently sets up a primary liability on the part of an adjoining property owner who is ordered to be made a party defendant in the answer, the failure of the plaintiff to amend his complaint as allowed by the court does not give the defendant thus brought in the right to successfully demur to the sufficiency of the complaint, and have the action dismissed as to him, the allegations of the answer being sufficient. C. S., 602, 508, 511. *Ibid.*

18. *Actions—Discontinuance—Service—Alias Summons.*—Where an action is brought to recover damages for the negligent killing of plaintiff's intestate, and the summons has been returned unserved, it is now required that the plaintiff sue out an uninterrupted chain of alias summons, and a failure to do so will be fatal to the maintenance of his action, unless service is made within the statutory period of one year. *McGuire v. Lumber Co.*, 806.

ACTS. See Elections, 1.

ADMISSIONS. See Deeds and Conveyances, 6; Contracts, 10; Employer and Employee, 17; Evidence, 21.

ADVERSE POSSESSION. See Dower, 4; Limitation of Actions, 1.

ADVERTISEMENT. See Statutes, 8.

AFFIDAVITS. See Judgments, 14.

AGENCY. See Banks and Banking, 5; Principal and Agent 4.

AGREEMENT. See Appeal and Error, 7, 30; Contracts, 19, 28, 43, 47; Trials, 1.

ALCOHOLIC LIQUOR. See Evidence, 34.

ALIAS SUMMONS. See Actions, 18; Process.

ALLEGATIONS. See Pleadings, 4.

AMBIGUITY. See Contracts, 22, 36.

AMENDMENTS. See Courts, 1; Judgments, 11; Pleadings, 18, 20.

ANSWER. See Pleadings, 16.

APPEAL AND ERROR. See Divorce, 3; Corporation Commission, 1; Evidence, 3, 4, 7, 9, 10, 17, 19, 21, 24, 27, 40; Injunction, 1, 2, 5; Instructions, 1, 3, 8, 9, 10, 11, 13; Issues, 1; Constitutional Law, 3, 9; Courts, 1, 5, 7; Intoxicating Liquor, 2, 3; Judgments, 5, 6, 12; Pleadings, 8, 11, 18; Actions, 2; Wills, 9, 10, 11; Employer, and Employee, 7, 24; Deeds and Conveyances, 12; Elections, 2; Executors and Administrators, 3; Homicide, 2, 3; Limitation of Actions, 1; Landlord and Tenant, 2; Taxation, 6; Trials, 1; Contracts, 31; Criminal Law, 8; Municipal Corporations, 12.

1. *Appeal and Error—Burden of Proof—Evidence.*—The appellant must show error in the Supreme Court on appeal, and where he has excepted to the exclusion of evidence, the record must show the relevance and materiality of the evidence excepted to, and its bearing upon the issues. *Newbern v. Hinton*, 108.

2. *Same—Conclusions of Law—Harmless Error.*—The admission of testimony of a witness excepted to upon the ground that it contained a conclusion of law becomes immaterial when the law has been correctly stated by him. *Ibid.*

3. *Same—Instructions—Verdict.*—Exceptions to the refusal of the trial judge to give appellant's prayers for special instruction cannot be sustained when the jury has found for appellant upon the evidence therein involved. *Ibid.*

4. *Appeal and Error—Newly Discovered Evidence—Motions—New Trials.*—In criminal actions, the Supreme Court will deny a motion for a new trial made upon the ground of newly discovered evidence. *S. v. Griffin*, 133.

5. *Appeal and Error—Record—Judgment—Facts Found—Case on Appeal—Inconsistent Statements.*—The judgment setting forth the facts in a case on appeal to the Supreme Court is a part of the record, and controls when the statement in "the case on appeal" is in material conflict. *Bartholomew v. Parrish*, 151.

6. *Appeal and Error—Objections and Exceptions—Irregular Judgments—Motions.*—A judgment in appellant's favor taxing the costs of action at variance with the decision of the Supreme Court rendered on appeal, signed upon appellant's motion in the Superior Court, C. S., 659, after examination had been afforded to the appellee's attorney, is not irregular, and when not thus taken through mistake, inadvertence, surprise or excusable neglect, the procedure is by exception and appeal, and not by motion in the cause at a subsequent term of the trial court. *Phillips v. Ray*, 152.

7. *Appeal and Error—Docketing—Extension of Time—Agreement of Counsel—Approval of Judge—Statutes.*—In order for the appellant to have his appeal determined by the Supreme Court as a matter of right, it is imperative that he docket it in the court under the rule as it applies to his district, and no consent of the parties as to extended

APPEAL AND ERROR—*Continued.*

time to be given, in making up and settling the case, etc., and no approval thereof of the trial judge under the provisions of C. S., 643 can have additional force when by reason thereof the appeal has been docketed later than the time required by the rule. *Finch v. Comrs. of Nash*, 154.

8. *Appeal and Error—Instructions—Verdict—Judgments—Objections and Exceptions.*—Where the plaintiff's right of dower is principally involved in the action, and plenary evidence in her favor tends to establish it, it is unnecessary on her appeal that she should have offered special prayers for instruction on the law involved and an exception to the judgment rendered adversely to her is sufficient to present the question to the Supreme Court. *Rook v. Horton*, 181.

9. *Appeal and Error—Record—Case on Appeal—Variance.*—Where the record does not state the truth in regard to an appeal, the appellant should move the trial court to have it corrected, and where there is a variance between the record proper and the case on appeal as to an exception claimed to have been taken, the former will control. *Chesson v. Bank*, 188.

10. *Appeal and Error—Evidence—Harmless Error.*—Where corroborative evidence is erroneously excluded, its subsequent admission will render the error harmless. *Rigsbee v. R. R.*, 231.

11. *Appeal and Error—Injunction—Presumptions—Facts Found.*—While the findings of fact by the Superior Court judge in injunction proceedings are not conclusive on appeal, there is a presumption in favor of the proceedings in the lower court, which places the burden upon the appellant to assign and show error. *Vester v. Nashville*, 265.

12. *Appeal and Error—Burden of Proof—Harmless Error.*—On appeal to the Supreme Court, the burden is on the appellant not only to show error, but that it was prejudicial; and where there has been error committed in the court below, a reversal will not be had when upon the record it properly appears that a correct result has been reached, as a conclusion of law. *Perry v. Surety Co.*, 285.

13. *Appeal and Error—Rules of Court—Briefs—Judgments.*—Where the appellant has not filed a brief in the Supreme Court, under the rule the judgment appealed from will be affirmed on appellee's motion, if upon examination of the record proper no error appears. *Comrs. of Cumberland v. Dickson*, 330.

14. *Appeal and Error—Record.*—The record of the trial on appeal is to be Observed in the Supreme Court as importing verity. *S. v. Berry*, 363.

15. *Appeal and Error.*—Where there is error found on appeal as to one of the appealing defendants so interrelated as to affect the other's legal rights, a new trial will be ordered as to both. *Tennant v. Bank*, 364.

16. *Appeal and Error—Issues.*—Issues tendered that are immaterial to the determination of the controversy in an action, are properly refused by the court. *Williams v. Coleman*, 369.

17. *Appeal and Error—Dismissal—Process—Fragmentary Appeal.*—An appeal may be taken from the refusal of the trial judge to set aside a judgment for lack of service of process, and the appeal is not objectionable as fragmentary. *R. R. v. Cobb*, 375.

APPEAL AND ERROR—*Continued.*

18. *Appeal and Error—Evidence—Objections and Exceptions—Unanswered Questions.*—Exceptions to the exclusion of evidence will not be sustained on appeal when directed to questions to which no answers appear in the record. *Hooper v. Trust Co.*, 423.

19. *Appeal and Error—Evidence—Harmless Error.*—Where it appears on appeal that the admission on the trial of evidence excepted to could not have prejudiced the appellant, no reversible error will be found. *Ibid.*

20. *Appeal and Error—Issues.*—Issues submitted will not be held insufficient or their submission erroneous, when the parties have been afforded opportunity to introduce all pertinent evidence and apply it fairly. *Ibid.*

21. *Appeal and Error—Rules of Court—Motion to Affirm Judgment—Record Proper—Certiorari.*—Upon motion of the Attorney-General when the case is regularly called for argument, on an appeal by defendant, the judgment of the Superior Court will be affirmed when the rules of practice relating to appeals have not been complied with, no motion for a *certiorari* has been made by the appealing defendant, and from an inspection of the record proper, it does not appear that error has been committed on the trial. *S. v. Dawkins*, 443.

22. *Appeal and Error—Judgments—Second Appeal.*—Where on a former appeal the court below has been reversed, but leaving unpresented the form of the judgment to be rendered, the law as decided by the court as therein applicable should be followed and considered as determinative; but errors alleged in the judgment otherwise may again be appealed from. *McGehee v. McGehee*, 476.

23. *Appeal and Error—Former Appeal—Issuable Matters—Judgment.*—While the trial judge should apply the law to the case as decided on a former appeal therein, it is reversible error for him to sign a judgment without submitting to the jury determinable matters left open for their consideration. *Ibid.*

24. *Appeal and Error—Objections and Exceptions—Case.*—Exception to an argument of the solicitor to the jury on the trial for a capital felony, made in the statement of case on appeal, comes too late for its consideration by the Supreme Court. *S. v. Steele*, 506.

25. *Appeal and Error—Objections and Exceptions—Contentions of Parties—Instructions.*—Where a party does not object at a proper time to the statement of a contention by the judge in his charge to the jury, and fails to ask in apt time special instructions on that point, his exception for the first time in the record on appeal is unavailing. *Ibid.*

26. *Appeal and Error—Objections and Exceptions—Remand.*—Where on appeal from an inferior court some of the appellant's exceptions have been sustained in the Superior Court, and also in the Supreme Court, resulting in a remand of the case to the initial court, the appellant may not successfully complain that all of his exceptions on his first appeal had not been passed upon. *Davis v. Wallace*, 543.

27. *Appeal and Error—Record—Courts—Findings of Fact.*—Where the court in finding certain facts in the case on appeal makes such findings as are clearly contradictory to the judgment set out in the record, the

APPEAL AND ERROR—*Continued.*

findings will be disregarded, and the Supreme Court will construe the record to ascertain the actual facts when such clearly appear therefrom. *Dameron v. Carpenter*, 595.

28. *Appeal and Error—County Court—Superior Court—Supreme Court.*—Appeals from a statutory county court must be taken intermediately to the Superior Court, from which the appeal then lies to the Supreme Court. *Cook v. Bailey*, 599.

29. *Appeal and Error—Inferior Court—Superior Court—Statutes—Trials.*—Upon an appeal from the statutory county court to the Superior Court, on refusal of a motion to set aside a judgment for excusable neglect, etc., the trial is not *de novo* in the latter court. *Ibid.*

30. *Appeal and Error—Agreement of Counsel—Pending Cases.*—Where upon appeal the parties do not agree that the decision of the Supreme Court therein may abide that of another case pending, the Court will recognize a distinction between the two cases, and decide upon each case as presented by the record. *Simpson v. Tobacco Growers*, 603.

31. *Same—Burden to Show Error—Presumption.*—The presumption on appeal to the Supreme Court is in favor of the correctness of the judgment in the Superior Court, and requires the appellant to show the error of record of which he complains. *Ibid.*

32. *Appeal and Error—Trials in Lower Court.*—Ordinarily the case on appeal is heard and determined according to the theory upon which it was tried in the Superior Court. *Cook v. Sink*, 620.

33. *Appeal and Error—Burden of Proof—Issues—Verdict Set Aside in Part.*—The trial court has a discretion to submit issues arising from the evidence and pleadings for the jury to determine, and while it is improvident to set aside the verdict on one of the issues, when such issue is interwoven with the others, it will not be held for reversible error when the appealing party has not shown prejudice thereby. *Campbell v. Laundry*, 650.

34. *Appeal and Error—Supreme Court—Per Curiam Opinions—Stare Decisis.*—A per curiam opinion of the Supreme Court is a precedent upon the questions therein embraced, and ordinarily is filed where the Court is of one mind and the points of law involved are controlled by previous decisions, or otherwise they are of such a nature as not to require discussion. *Hyder v. Henderson County*, 663.

35. *Appeal and Error—Criminal Law—Instructions—Presumptions—Record—Reasonable Doubt.*—Where the defendant has excepted to the trial in a criminal action upon the evidence tending to show his guilt beyond a reasonable doubt, and the evidence thereon is sufficient, it will be presumed on appeal to the Supreme Court that the trial judge fully instructed the jury as to what constituted reasonable doubt as a matter of law, when the charge is not set out in the record. *S. v. Sigmon*, 684.

36. *Appeal and Error—Case—Laches—Certiorari.*—Where the appellant has pursued his right of appeal to the Supreme Court in accordance with the requirements in such cases, and through no laches or neglect of his, his case has not been docketed within the time required, upon his motion in the Supreme Court duly made and in apt time, a *certiorari* will be granted. *Bank v. Miller*, 775.

APPEAL AND ERROR—*Continued.*

37. *Appeal and Error—Harmless Error.*—In order to set aside a judgment of the Superior Court on appeal, it must be made to appear that the error complained of was substantial, and worked an injustice on the appellant. *Lumber Co. v. Sturgill*, 776.

38. *Appeal and Error—Injunction—Findings—Review.*—Upon exception to the findings of fact by the trial judge in injunction proceedings to restrain the violation of covenants running with the lot conveyed in a general scheme of development, the Supreme Court on appeal may pass upon the evidence of record in the case. *Johnston v. Garrett*, 835.

APPEARANCE. See Criminal Law, 8.

APPLICATION. See Insurance, 1.

APPROVAL. See Appeal and Error, 7.

ARBITRATION. See Contracts, 43.

ARGUMENT OF COUNSEL. See Courts, 6.

ARREST.

1. *Arrest—Slander—Malice.*—In order for the arrest of defendant after judgment against him in an action for slander, it must appear by answer of the jury to a separate issue that the words falsely or slanderously spoken were actuated by defendant's actual malice toward the plaintiff. *Swain v. Oakey*, 113.

ASSAULT AND BATTERY. See Criminal Law, 1.

ASSESSMENTS. See Municipal Corporations, 1, 2; Drainage Districts, 1.

ASSIGNMENT OF CONTRACTS. See Schools, 6.

ASSUMPTION OF RISKS. See Employer and Employee, 16.

ATTACHMENT. See Sheriffs, 1.

ATTEMPT. See Criminal Law, 3.

ATTORNEY AND CLIENT. See Judgments, 9.

AUTHORITY. See Principal and Agent, 4; Municipal Corporations, 5.

AUTOMOBILES. See Negligence, 8, 12, 18; Homicide, 6.

1. *Automobiles—Statutes—Interpretation—Transfer of Title—Mortgages.*—Chapter 236, Public Laws of 1923, requiring a certificate of the transfer of title to an automobile to be issued to purchaser by the Secretary of State (now Commissioner of Revenue), making its violation a misdemeanor, is a penal statute and strictly construed, *in pari materia* with our registration laws, C. S., 3311, 3312, relating to the registration of mortgages, and it does not repeal the latter statutes so as not to require the registration of title retaining contract to secure the balance due on the purchase price of an automobile, as against subsequent purchaser for value, and no notice however formal is sufficient to supply that of registration required by the statute. *Corporation v. Motor Co.*, 157.

AUTOMOBILES—*Continued.*

2. *Same—Courts.*—Where the vendor of an automobile has sold the same without complying with our statute requiring a certificate of the transfer of title, *semble* the court may direct him to deliver this certificate to the vendee so that he may comply with the statute and obtain a new certificate. *Ibid.*

3. *Automobile—Family Car—Parent and Child—Principal and Agent—Negligence.*—Where the father of a family keeps a car for the use of his family, and permits his children to drive it, he is responsible in damages for a personal injury proximately caused to another by the negligence of his son while driving it for his own purposes, when he has theretofore customarily permitted his son, an adult living with him, to thus use the car. *Watts v. Lefler*, 722.

BAILMENT. See Bills and Notes, 4; Contracts, 12.

1. *Bailment—Banks and Banking—Safe Deposit Boxes.*—Where a bank rents safe deposit boxes in its vault to its customers, giving each a key thereto, retaining the master key necessary for the customer to get at the contents of his box, the latter retains title to the contents of the box, and the relation of bailor and bailee is established, in the absence of a special contract to that effect. *Morgan v. Bank*, 209.

2. *Same—Negligence—Damages.*—The responsibility of bailee rests upon the exercise of his ordinary care to keep the goods in his possession, upon the terms of the bailment, and the liability of insurer does not therein exist. *Ibid.*

3. *Same—Special Contract.*—Where a bank takes out burglar insurance on the contents of safe deposit boxes in its vault, it is not alone evidence of a special contract that will make the bank liable as an insurer of the contents of the safe deposit box rented by it to its customer. *Ibid.*

4. *Same—Evidence—Burden of Proof—Nonsuit—Pleadings.*—In order to recover from a bank for the loss by burglary of the contents of a safe deposit box rented in its vault, etc., it is required of the renter of the box to allege and prove negligence therein on the part of the bank, and where the evidence tends only to show that the bank had used due care in maintaining a vault as generally was considered sufficient in the locality, and the fact of loss by burglary, a motion for judgment as of nonsuit is properly granted. *Ibid.*

BANKS AND BANKING. See Bailment, 1; Evidence, 39; Criminal Law, 5; Partnership, 1; Pleadings, 12; Actions, 5; Contracts, 38.

1. *Banks and Banking—Cashier—Materialmen—Principal and Surety—Guarantor of Payment.*—A cashier of a bank has only the authority to bind the bank in transactions usually within the scope of his authority as such officer, and no implied authority to guarantee in behalf of the bank the payment for material furnished the contractor for a building in which he was personally interested, and in which the bank had no interest, though it was contemplated that a part of the building would probably be used by the bank when erected. *Quarries Co. v. Bank*, 277.

2. *Banks and Banking—Receiver—Depositor—Debtor and Creditor—Dividends—Endorsers.*—Where a bank has discounted a negotiable

BANKS AND BANKING—*Continued.*

note in due course before maturity with indorsement thereon, and has arranged with the endorser, secondarily liable, C. S., 3047, that he will keep on deposit a sufficient sum to pay the instrument when it should become due, and thus to be paid therefrom, the receiver of the bank appointed after the maturity of the note stands in the same relation to the surety as the bank, or as both debtor and creditor of the surety, and as such may charge the note to the depositor's account less whatever distributive parts of the assets of the bank may be available and apportionable thereto. *Williams v. Coleman*, 368.

3. *Banks and Banking—Receivers—Actions—Parties.*—Upon the appointment of a receiver of a banking institution of this State, under the statute, whether voluntary or by act of the Corporation Commission, the title to all of its assets vests in the receiver to be administered for the benefit of its depositors, etc., alike, and where the directors are individually sued for having published false statements as to its solvency, and in the bank's report to the Corporation Commission, without alleging any damage peculiar to himself therefrom, as distinguished from a loss among the creditors generally, the action is maintainable only by the receiver or upon his refusal to so act upon application. C. S., vol. III, secs. 218(a), 218(c), 219(a), C. S., 1210. *Douglass v. Dawson*, 458.

4. *Same—Pleadings—Demurrer.*—Where a complaint against the directors or officers of a bank in the receiver's hands under our statute, alleges that they by their acts of omission or commission have authorized the making of false reports or advertisements of the solvency of the bank, etc., and thereby caused loss to depositors or creditors, and no special circumstance is alleged to show that the plaintiff has been peculiarly damaged by false representations made to him personally, or that the receiver has been asked and refused to act, a demurrer to its sufficiency of allegations to constitute a cause of action will be sustained. *Ibid.*

5. *Banks and Banking—Bills and Notes — Negotiable Instruments — Endorsement—Agency for Collection—Principal and Agent.*—Where a certificate of deposit in a bank has been endorsed by the depositor to another bank, which credits his account with the amount thereof, and upon its nonpayment thereof the bank charges the account of its depositor therewith upon the ground of his legal liability as an endorser, the evidence is not susceptible of the inference that the discounting bank received the certificate as an agency for collection, and to render it liable for the equities existing between the original parties. *Trust Co. v. Trust Co.*, 468.

6. *Same—Evidence—Instructions.*—Where the bank that has issued a certificate of deposit sued on by an endorsee bank interposes the defense that the instrument sued on was nonnegotiable, and subject to the equities existing between it and the payee of the certificate, and offers no evidence of a loss on that account, an instruction directing a verdict in favor of the endorsee bank is properly given by the trial judge. *Semble*, an instrument payable in current funds is nonnegotiable; but, *Held*, the instruction was proper in either event. *Ibid.*

7. *Banks and Banking—Loans—Statutes—Officers—Parties.*—Where the official position of an officer of a bank is such as necessarily to ac-

BANKS AND BANKING—*Continued.*

quaint him of the violation of the statute respecting the making of loans, and to fix him as a party thereto, it is sufficient evidence to sustain his conviction of the misdemeanor therein prescribed. C. S., vol. III, secs. 221(e), 222(i). *S. v. Cooper*, 529.

8. *Banks and Banking—Deposit—Joint Accounts — Presumptions — Contracts—Judgments.*—Where under a consent judgment moneys have been deposited in a bank to the joint account of husband and wife, as in other instances, it will be presumed, nothing else appearing, that each was to have an interest therein equal to the other. *Smith v. Smith*, 765.

BARGAIN AND SALE. See Contracts, 7, 11.

BEQUESTS. See Wills, 8.

BETTERMENTS. See Judgments, 2.

BIAS. See Evidence, 40.

BIDS. See Injunction, 4; Contracts, 15.

BILLS OF LADING. See Carriers, 2.

BILLS AND NOTES. See Banks and Banking, 5; Principal and Agent, 2; Equity, 4.

1. *Bills and Notes—Payment—Intent—Evidence—Questions for Jury — Nonsuit.*—Where the evidence is conflicting as to the intent of the parties to include a mortgage note in one given in a larger transaction, releasing the mortgage security, the question is one for the determination of the jury, and defendant's motion as of nonsuit thereon is erroneously granted. *Taylor v. Bank*, 175.

2. *Bills and Notes—Endorsers—Sureties—Statutes.*—The writing of one's name upon the back of a negotiable instrument makes the person liable as an endorser, nothing else appearing, C. S., 3044; but where upon the face of the note is written that the endorsers hereto are bound as sureties, it becomes a question of law for the court, though denied by the pleadings, and the liability of such persons will be that of sureties. *Dillard v. Mercantile Co.*, 225.

3. *Same—Limitation of Actions.*—Where from the conditions stated upon a negotiable note, the endorsers sign as sureties, a payment thereon of the maker before the same is barred, suspends the running of the statute of limitations as to all within this class, C. S., 416, and a payment of the interest on the note by one of the sureties will repel the bar of the statute as to all of the sureties thereon. *Ibid.*

4. *Bills and Notes — Negotiable Instruments — Bailment — Special Contract.*—The relation of bailor and bailee for hire is established where the owner of government bonds for a consideration loans them to a bank under an agreement for their return at a time specified, but where the known purpose is to enable the bank to secure a loan by using these bonds as collateral to its note, it is upon a special contract that in the event of the failure of the bank to return the bonds, it would be liable in damages to the owner for the loss he may sustain by reason of the failure of the maker of the note to pay it. *Whitford v. Lane*, 343.

BILLS AND NOTES—*Continued.*

5. *Same—Equity—Marshaling Assets—Exoneration.*—The owner of government bonds loaned them upon consideration to a bank for the purpose of its hypothecating them as collateral to a note given for money borrowed by it from another bank, its note containing the stipulation that collateral securities to the note may be considered as collateral to other notes of the maker, etc., with knowledge of the lending bank of the purpose for which the bonds were loaned; and without the knowledge or consent of the owner that it was used for other purposes this note was later included in a larger note with other collateral of the borrowing bank, and upon default in payment: *Held*, the lending bank was required to marshal the assets from the further collateral of the borrowing bank, to the exoneration *pro tanto* of the bonds specially loaned. *Ibid.*

6. *Bills and Notes—Negotiable Instruments—Guarantor of Payment.*—A guarantor of payment of a note is unconditionally liable upon default of the maker to pay it when due, to the one to whom the guaranty was made. *Trust Co. v. Godwin*, 513.

7. *Bills and Notes—Negotiable Instruments — Fraud — "Due Course" — Damages—Instructions.*—Where fraud in the procurement of the note sued on is found, and defendants plead and offer evidence to show that they are innocent holders for value, an instruction upon the measure of damages is not error that makes them dependent upon the answer to this issue. *Michaux v. Lumber Co.*, 617.

8. *Bills and Notes—Release of Party Thereto—Statutes—Consideration.*—The right of an obligor to defend an action against himself on a negotiable note under the provisions of C. S., 3104, that the holder may expressly renounce his right against any party to the instrument before, at or after its maturity, rests by statute, and may be done by virtue thereof only as therein expressed when the release is in writing, and may not be shown when resting only by parol. C. S., 3101, relating to the discharge of the instrument, has no application. *Manly v. Beam*, 659.

9. *Same—"Release"— Discharge.*—The release by the holder of a negotiable instrument of his right against any party thereto to hold him liable, is the same in legal effect as the renunciation of this right. *Ibid.*

BLASTING. See Employer and Employee, 18.

BOARDS. See Schools, 1; Education, 2.

BONDS. See Principal and Surety, 1; Officers, 2; Actions, 12; Official Bonds.

BOOKS. See Evidence, 39; Taxation, 2, 5, 6.

BREACH. See Contracts, 3, 5, 7; Actions, 12, 14; Deeds and Conveyances, 3, 5, 7; Evidence, 26.

BRIEFS. See Appeal and Error, 13.

BUILDINGS. See Contracts, 32, 48.

BURDEN OF PROOF. See Corporation Commission, 1; Appeal and Error, 1, 12, 31, 33; Contracts, 2; Negligence, 1, 2, 24; Claim and Delivery, 1; Bailment, 4; Employer and Employee, 4; Evidence, 13, 19, 31; Pleadings, 8; Actions, 13; Carriers, 5.

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1. *Carriers of Goods—Railroads—Freight Charges—Sales — Proceeds — Actions—Evidence.*—Where a shipment of hay has been sold by a railroad company shipped under an order notify bill of lading, for the payment of freight charges, the owner of the legal title is entitled to the excess amount the shipment has brought at the sale, and the market value at the time of the sale is evidence of the amount the hay brought thereat. *Temple v. R. R.*, 438.

2. *Same—Bills of Lading—Order Notify—Endorsements—Title—Actions—Parties—Negotiable Instruments.*—Where an order notify bill of lading has been endorsed by the shipper, it is negotiable, and the holder may maintain his action thereon. C. S., 290. *Ibid.*

3. *Same—Stipulation—Conditions.*—In an action to recover of a railroad company the balance of the proceeds of sale of a carload of hay, over the amount necessary to pay carriage charges, the provision in the bill of lading requiring written notice within four months for claim for damages, etc., is inapplicable. *Ibid.*

4. *Carriers—Express Companies—Claims—Statutes — Penalties.* — C. S., 3524, permitting a recovery of a common carrier for failure to settle a claim for damages to an intrastate shipment in ninety days after a written demand has been made on it, etc., is a penal statute, and in order to recover, the plaintiff must bring his case strictly within its terms. *Watkins v. Express Co.*, 605.

5. *Same—Prima Facie Case—Unreasonable Delay — Burden of Proof.* — The burden is on plaintiff to show that the common carrier has failed to settle his claim in ninety days, etc., after written demand under the provisions of C. S., 3524, applying to intrastate shipments, and the prima facie case made out by showing the unreasonable delay in the delivery of the shipment, is not sufficient. *Ibid.*

6. *Same—Evidence.*—In an action to recover against a common carrier the penalty allowed by C. S., 3524, it was agreed that the trial judge find the facts as to whether there was a claim in writing presented to it as required by the statute, and the issue was found against the plaintiff: *Held*, the presumption is that the finding was upon sufficient evidence, nothing else appearing of record on appeal, and the appellant having failed to make out his case, the judgment of the lower court will be affirmed. *Ibid.*

7. *Same—Demand.*—In order to recover the penalty for failure to settle a claim for damages within ninety days, etc., the burden is on plaintiff to show that the amount of his recovery should be at least equal to the amount of his written demand. *Ibid.*

CARRIERS OF GOODS. See Carriers.

CASE. See Appeal and Error, 5, 9, 24; Reference, 1, 36.

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CLAIM AND DELIVERY. See Actions, 11; Contracts, 24.

1. *Claim and Delivery — Actions — Interveners — Issues — Burden of Proof.*—An interpleader or intervener in claim and delivery has not the same status as one who has regularly become a party plaintiff or defendant therein, and he has the burden of proof upon the single issue involving his independent right to the property in controversy. *Sitterson v. Speller*, 192.

CLERKS OF COURT. See Judgments, 10; Process, 3.

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COMITY.

1. *Comity—Foreign Corporations—Conditions—Statutes.* — A corporation of one state may do business in another only by comity of the latter state, when not so permitted by a valid Federal statute as in matters of intestate commerce, and may be prohibited from doing business therein entirely, or upon conditions made a prerequisite by statute. *Lunceford v. Association*, 314.

COMITY—*Continued.*

2. *Same—Commerce — Insurance — Process — Summons.* — The insurance business is not regarded as "commerce" within the intent and meaning of the law, and where foreign corporations do business in North Carolina, they impliedly accept the conditions of C. S., 483, that they must keep process agents within our jurisdiction subject to the process of our courts, and that summons in an action may be served on them by leaving a copy of the original with the Secretary of State as the statute directs. *Ibid.*

3. *Same—"Doing Business."*—A foreign company acquiring membership of persons in North Carolina for life insurance, without soliciting agents to whom policies are issued upon a mutual benefit plan and kept in force by the payments of dues, is doing a life insurance business here in contemplation of C. S., 483, and valid service of summons may be had on such corporation upon compliance with its provisions in respect thereto. *Ibid.*

COMMERCE. See Telegraphs, 1; Comity, 2; Employer and Employee, 14, 15.

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221(e), 222(i). Position of bank official sufficient for conviction. *S. v. Cooper*, 529.

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273. Facts found by trial upon evidence not reviewable on appeal. *Baker v. West*, 335.

290. Order notify bill of lading is negotiable. *Temple v. R. R.*, 439.

416. A payment by surety on note will repel bar of statute as to other like sureties. *Dillard v. Mercantile Co.*, 226.

463. Action to recover specific personal property, with injunctive relief incidentally, brought in county where property is situated. *Fairley v. Abernathy*, 494.

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537. Motion in cause to make complaint more definite and not by demurrer. *Nye v. Williams*, 129.

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659. Exception to taxing cost after submission to opposing party as contrary to decision of Supreme Court should be taken by appeal and not by motion in the cause. *Phillips v. Ray*, 152.

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829, 840. Owner of property attached not a party to attachment, may maintain independent action against sheriff, sureties, etc. *Flowers v. Spears*, 748.

833. When defendant in claim and delivery may maintain independent action. *Davis v. Wallace*, 543.

868. Jury not required to order books of ex-sheriff to be turned over to his successor. Title to office not involved. *Lenoir County v. Taylor*, 336.

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1654, Rule 4. Gift by deed to issue of another but upon condition, the "issue" thus named take, if at all, directly from the donor upon the happening of the contingency. *Stevens v. Wooten*, 378.

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2171, 2172. Ward's estate not held liable for damages upon guardian's false warranty of lease of lands when sections not complied with. *Coxe v. Sales Co.*, 838.

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3311, 3312. *Tort-feasor* not a purchaser. Actions. *Harris v. R. R.*, 480.

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5468. Contract for lighting public school buildings when not within statute of frauds. *Conrad v. Board of Education*, 390.

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8037. County commissioners may elect to foreclose tax lien under C. S., 7990. *New Hanover Co. v. Whiteman*, 332.

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II, sec. 29. County commissioners have no authority to increase civil jurisdiction of an established recorder's court. *Provision Co. v. Daves*, 8.

II, sec. 29. Legislature may directly authorize county commissioners to take over part of highway. *Hill v. Commissioners of Gates*, 124.

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IV, sec. 12. Legislature cannot delegate power to distribute court's jurisdiction. *Provision Co. v. Daves*, 7.

IV, sec. 14. Violation of city ordinance a misdemeanor and punishable. Penalty. *S. v. Abernethy*, 768.

V, sec. 3. Inheritance tax does not come within provision as to double taxation and rests with legislature. *In re Davis, etc.*, 358.

VII, sec. 2. County commissioners should require settlement with sheriff before accepting his bond. *Lenoir County v. Taylor*, 336.

VII, sec. 7. Legislature authorizing county commissioners to take over part of public highway not a pledging of faith or credit prohibited by court. *Hill v. Commissioners of Gates*, 124.

VII, sec. 9. Statute in this case not a violation of uniformity rule of Constitution. *Hill v. Commissioners of Gates*, 124.

X, secs. 3 and 5. Widow's exemption hereunder. Right of dower as against heirs. *Barnes v. Cherry*, 772.

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CONSTITUTIONAL LAW.

1. *Constitutional Law—Courts—Legislative Powers—Delegation of Powers—Recorders' Courts—Extended Jurisdiction—County Commissioners.*—The provisions of Art. IV, sec. 12, of our Constitution giving the

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Legislature the authority to distribute that portion of the judicial power and jurisdiction of courts not pertaining to the Supreme Court, among other courts is restricted in its exercise to the Legislature itself, and may not be delegated by it; and where a recorder's court has been already established under the provisions of the Constitution, Art. II, sec. 29, an act of the Legislature which authorizes the county commissioners to increase the jurisdiction of such recorders' courts in civil matters is unconstitutional and invalid. Instances in which statutes are held valid that permit a delegation of power only to ascertain the existence of facts that bring the case within the exercise of a valid legislative power, discussed by STACY, C. J. *Provision Co. v. Daves*, 7.

2. *Constitutional Law—Local Laws—Due Process—Taxation—Uniformity.*—A public local law authorizing the commissioners of a county to take over a specified highway within the county, constituting one of the principal highways within the county, connecting two important State highways, transferring to the said commissioners the bridges of the various townships for their care and supervision, is not violative of Art. II, sec. 29, of our Constitution against direct legislation by local, private or special act, nor the taking of property without due process of law, Art. I, sec. 17; nor the pledging of the county's faith or credit without the approval of the voters, etc., Art. VII, sec. 7; nor against the uniformity rule, Art. VIII, sec. 9: *Semble*, such powers are declaratory or supplemental to the general statute law, and valid. *Hill v. Comrs. of Gates*, 123.

3. *Constitutional Law — Punishment — Statutes — Discrimination — Sentence—Court's Discretion—Appeal and Error.*—Upon conviction of the criminal offense inhibited by C. S., 4210, a sentence of the court for a period within that allowed by statute will not be considered on appeal as a cruel or unusual punishment against the provision of our Constitution, Art. I, sec. 14, or discriminatory against the principal actor in committing the crime, when the others participating therein to a less extent have been sentenced for shorter terms, the sentences imposed being left largely in the discretion of the trial court, and in the absence of an abuse of this discretion not reviewable on appeal. *S. v. Griffin*, 134.

4. *Constitutional Law — Criminal Law — Trial by Jury — Conviction — Verdict.*—It is required by our organic law that with certain reservations conferred on the Legislature in case of misdemeanors, that for a lawful conviction of a crime a unanimous verdict must be rendered by a jury of twelve in open court, and a verdict of guilty rendered by a less number is unconstitutional. Const. of N. C., Art. I, sec. 13. *S. v. Berry*, 363.

5. *Constitutional Law—Equity—Courts.*—Art. IV, sec. 1, of our Constitution (1868), abolishing "the forms" of suits in equity, does not imply that the distinctions between law and equity are abolished, and the effect is to make them cognizable and triable in the same court. *Furst v. Merritt*, 397.

6. *Same—Fraud in the Factum.*—Where a contract is avoided by fraud in the *factum*, it is void *ab initio* and no rights therein are acquired by the parties thereto. *Ibid.*

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7. *Same Fraud in the Treaty.*—As affects innocent third parties, a contract that is fraudulent in the treaty is voidable in the equitable jurisdiction of the court as distinguished from one fraudulent in the factum, formerly cognizable only in a court of law. *Ibid.*

8. *Same—Actions—Suits.*—Where fraud in the factum and fraud in the treaty in defense to an action upon contract are involved in the action, one relates to the execution of the contract and the other to the meeting of the minds into an agreement upon the subject-matter. *Ibid.*

9. *Same—Issues—Appeal and Error.*—In an action upon contract where fraud in the *factum* and fraud in the treaty as affecting the rights of innocent third persons are both relied upon for defense, it is reversible error for the trial court to submit to the jury, the issue as to whether the instrument was procured by fraud and false representations, without observing the distinctions between the legal and equitable principles involved. *Ibid.*

10. *Constitutional Law—Equity—Courts—Jurisdiction.*—The distinction between equitable rights and remedies have not been abolished by our Constitution, Art. IV, sec. 1, but are administered in the one tribunal. *Trust Co. v. Godwin*, 513.

CONSTRUCTION. See Instructions, 8; Contracts, 48.

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CONTINGENT INTERESTS. See Wills, 4; Estates, 4.

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CONTRACTS. See Bailment, 3; Counties, 1; Principal and Surety, 1, 3; Telegraphs, 2, 5; Evidence, 9, 26; Pleadings, 2, 14; Equity, 2; Bills and Notes, 4; Principal and Agent, 2; Schools, 5, 6; Actions, 12, 14; Insurance, 1, 4; Landlord and Tenant, 3; Partnership, 1; Corporations, 2, 3; Taxation, 4; Banks and Banking, 8; Gaming, 1.

1. *Contracts—Futures—Wagering Contracts—Parol Evidence—Statutes.*—Our statutes rendering void and unenforceable in our courts a contract for the sale of futures upon margin covered by the purchaser, that does not contemplate the delivery of the thing bargained for, but only a payment to be made for a loss incurred or a profit to be received in accordance with the fall or rise of the market, looks to the substance of the contract and not to its form, and parol evidence is competent to show the intention of the parties entering therein. C. S., 2144. *Welles & Co. v. Satterfield*, 89.

2. *Same—Evidence—Prima Facie Case—Burden of Proof—Instructions.*—As to whether a contract for the sale of shares of stock was intended by the parties to be upon speculation, in violation of C. S., 2144, or contemplated the actual delivery of the shares contracted to be sold, the defendant in the action, the purchaser, makes out a prima facie case upon evidence that it was founded upon a gambling or wagering con-

CONTRACTS—*Continued.*

sideration in violation of the statute, C. S., 2145, and thereupon the burden of proof to show to the contrary rests upon the plaintiff, and upon conflicting evidence becomes a question for the jury under proper instructions from the court. C. S., 2146. *Ibid.*

3. *Contracts—Breach—Demurrer—Motions—Statutes—Deeds and Conveyances.*—In an action for breach of contract for failure of defendant to insert certain restrictions as to character of buildings, etc., to be erected on lots sold in a general development plan, wherein all purchasers, of which the plaintiff was one, were to have an advantage or benefit, the complaint alleging the breach of such contract in specific detail is not demurrable, and where more definiteness of allegation is sought, the remedy should be pursued by motion to make the complaint more definite and specific. C. S., 537. *Nye v. Williams*, 129.

4. *Contracts—Evidence—Fraud.*—Where a written contract of sale excludes parol evidence by its express terms, evidence on behalf of the purchaser that he was prevented from reading and understanding it because of fine print therein he could not read without his spectacles at the time he signed it, is insufficient to show its procurement by the fraudulent representations of the seller's sales agent. *Colt v. Kimball*, 169.

5. *Contracts—Breach—Damages — Conditional Acceptance.* — Where one assuming to act as agent for another writes that he has a person who will take the property at a certain price, and the owner says she will sell at that price and asks that the proposed unnamed purchaser be referred to her for the consummation of the deal, the owner makes no unconditional acceptance of the offer, and no action for damages can be maintained against her for breach of contract of sale. *Powers v. Jones*, 185.

6. *Contracts—Writing—Statute of Fraud—Promise to Pay Debt of Another.*—Where the promise to answer for the debt, default or detinue of another is collateral, and merely superadded to that of the original promisor who remains liable therefor, and such promise does not create an original obligation, the second promisor cannot be held answerable on his promise unless reduced to writing, under the requirements of the Statute of Frauds. C. S., 987. *Lumber Co. v. Higgs*, 196.

7. *Contracts—Breach—Bargain and Sale—Damages.*—Where a circular letter quoting the price of a commodity for future delivery is sent by a commission man of the seller to a customer, and later the customer writes that he has mislaid the circular letter and substantially states the quoted price and the terms of delivery, etc., asking if the offer was then in force, and being informed that it was, accordingly orders the goods, the minds of the parties come together upon an agreement binding upon both, and the principal, upon the purchaser's refusal of performance, may recover from him the damages he has thereby sustained. *Refining Corporation v. Sanders*, 203.

8. *Same—Compromise and Settlement—Intent.* — Where there are two separate and distinct contracts of sale and purchase, and the purchaser sends his check in full payment of the balance due on the one,

CONTRACTS—*Continued.*

the acceptance of the check will not be regarded as a compromise and settlement of both contracts, and where the evidence is conflicting as to the intent of the parties, the question is for the jury. *Ibid.*

9. *Contracts — Parol Evidence — Vendor and Purchaser — Statute of Frauds.*—Where a contract given for the balance of the purchase price of a lighting plant states that the contract is entire as therein expressed, and that it may not be varied by parol, the purchaser in an action against him may not by his parol evidence maintain the defense that the company by its sales agent had guaranteed the good working condition of the plant for a period of years, etc., there being no evidence of fraud in the factum. *Colt v. Springle*, 229.

10. *Contracts—Principal and Surety—Admissions—Issues—Instructions.*—The plaintiff School Book Depository, under a contract with the principal defendant supplied school books to be sold on commission and accounting for sale, and upon the unsatisfactory dealing of defendant thereunder, refused to send more books, but afterwards did so upon the defendant's furnishing a bond with surety for his faithful performance of his contract. The defendant surety denied liability, acknowledged that he signed the bond, admitted the liability of his co-defendant for its breach, and the amount of damages claimed, but testified he signed the bond under a mistake as to its purpose, without sufficient allegation or evidence of fraud in the factum or in the treaty. *Held*, an instruction was proper in effect, that if the defendant surety signed the bond to answer the issue as to defendant's liability in plaintiff's favor. *Book Depository v. Riddle*, 432.

11. *Contracts — Bargain and Sale — Title Retaining Contracts — Chattel Mortgages.*—A contract for the sale of a chattel retaining title in the vendor to secure the payment of the purchase price or a part thereof, is in the nature of a chattel mortgage. *Harris v. R. R.*, 480.

12. *Same—Bailment.*—Where the seller gives possession to the purchaser under a title-retaining contract of sale of a chattel, the relation of bailor and bailee arises, with the distinction that the bailee has the further right or interest in the chattel, of making the payment according to the terms of the contract and acquiring the title. *Ibid.*

13. *Same—Mortgagor in Possession—Actions—Compromise—Principal and Agent.*—A mortgagor in rightful possession of the chattel may maintain an action for damages thereto by the negligence of a *tort-feasor*, or compromise and settle the damages out of court, and having the implied authority to so act for the mortgagee or bailor, the latter may not thereafter maintain an action against the *tort-feasor* for the same tort. *Ibid.*

14. *Same—Registration—Settlement.*—A *tort-feasor* whose negligence has damaged a chattel in the rightful possession of the mortgagor, is neither a purchaser nor creditor within the contemplation of our registration laws, C. S., 2576, 3311, 3312, and an action may be maintained against him for the consequent damage either by the mortgagor or mortgagee, and a settlement with one will preclude a recovery by the other. *Ibid.*

15. *Contracts—Municipal Corporations—Cities and Towns—Bids—Acceptance.*—A municipal corporation advertised for sealed bids to construct

CONTRACTS—*Continued.*

its water and sewer system to be accompanied by a certified check in a stated sum as a guarantee of good faith, with provision that parts of work should not be let out to subcontractors without the consent of the city, and at the date specified opened the bids and awarded the contract to the plaintiff in exact accordance with its proposal, subject to investigation as to its ability to perform the same: *Held*, the acceptance of the bid by the city made a binding contract, subject to the investigation by the city. *Building Co. v. Greensboro*, 501.

16. *Same—Reasonable Time.*—Where a municipal corporation accepts a bid for its water and sewer system subject only to its right to investigate the responsibility of the bidder to perform it, it is incumbent upon the city to make the investigation within a reasonable time, and the bidder may not withdraw its bid after its final and complete acceptance by the municipality. *Ibid.*

17. *Same—Interpretation.*—Where a municipality has accepted a bid for the construction of its waterworks and sewer system subject to an investigation as to the ability of the bidder to perform it, without authority to subcontract it either in whole or in part without the consent of the city, and pending this inquiry the bidder notifies the city of its intention to subcontract certain parts: *Held*, construing the offer, under its terms, and the notification together, the latter was not in effect a withdrawal of the bid, but at most only notice that, if the bid was accepted, the bidder's right to request permission to sublet would be exercised. *Ibid.*

18. *Same—Actions—Damages.*—Where a bidder for the erection of a water and sewerage system of a city, has put up a certified check in a certain amount as a guarantee of its ability to perform the contract in good faith if awarded to it, which was to be given to the lowest responsible bidder, under sealed bids to be opened at a stated time and when awarded to it fails or refuses to perform the contract, it may not maintain its action at law to recover the amount of the check it had deposited, when it was necessary for the city to retain it in order to protect itself from loss by the contract being given to a higher bidder. *Ibid.*

19. *Contracts—Agreement—Insurance—Policies.*—Where the general agent of the insurer rightfully declines to recognize the validity of a live-stock policy of insurance, countersigned and delivered after the death of its animal insured, and returns the premium paid by the insured to him, the policy sued on is invalid upon the ground that the minds of the parties had not agreed or come together so as to make a binding contract. *McCain v. Ins. Co.*, 549.

20. *Same—Interpretation.*—Where the written contract is clearly expressed without ambiguity, its language will control, leaving nothing for interpretation under the rules otherwise applicable in case of ambiguity. *Ibid.*

21. *Same.*—A written contract is the expression of the agreement of the minds of the parties, and not what either party erroneously thought it was. *Ibid.*

22. *Same—Ambiguity.*—In case of ambiguity in the words of a written contract, reasonable doubts are resolved against the one who has prepared it. *Ibid.*

CONTRACTS—*Continued.*

23. *Contracts—Landlord and Tenant — Ejectment — Leases — Re-entry — Possession—Statutes.*—Our statute writes into a contract of lease of lands when the lease is silent thereon, a forfeiture of the terms of the lease upon failure of the lessee to pay the rent within ten days after a demand is made by the lessor or his agent for all past due rent, with right of the lessor to enter and dispossess the lessee. C. S., 2343. *Bryan v. Reynolds*, 563.

24. *Contracts—Sales—Actions—Title—Claim and Delivery—Gifts—Consideration.*—Where an automobile was advertised to be given at an auction sale of lots of land to one present at the beginning and conclusion of the sale of all the lots, as an attraction to obtain bidders, by a drawing of names written upon cards, etc.: *Held*, in an action by one claiming the automobile as having complied with these conditions, it was necessary to his recovery that he show by the greater weight of the evidence that a delivery of the automobile, actual or constructive had been made to him in order that the title had vested in him, whether the transaction be regarded as being upon consideration or a gift. *Patton v. Heath*, 586.

25. *Contracts—Fraud—Evidence—Pleadings.*—In order to render void for fraud in its procurement a tobacco marketing contract made in conformity with the provisions of our statute, it is required that the member seeking to do so must introduce evidence of the fraud he relies on, as well as allege it. *Tobacco Growers v. Chilton*, 602.

26. *Contracts—Fraud—Misrepresentations.*—In order to avoid a written contract for fraud for misrepresentations of a party or his authorized agent, it must not only be shown that the statements complained of were false, but among other things that the party was at the time ignorant of their falsity, and was induced thereby to his damage, and he must show facts sufficient to make out a case of fraud with all the material elements required in such instances. *Simpson v. Tobacco Growers*, 603.

27. *Contracts—Misrepresentation—Fraud.*—Where one as agent for the Tobacco Growers Association falsely represents to a prospective member certain material advantages that induce him to sign the membership contract, without affording him, an illiterate man, an opportunity to become informed as to its contents, and he, within a reasonable time afterwards, is informed of this misrepresentation, and requests the agent to take his name off the books as a member and cancel the contract: *Held*, the agent and the one to whom the false representations were made were not upon an equality as to the facts, and the law will avoid the contract for the fraud. *Dunbar v. Tobacco Growers*, 608.

28. *Same—Agreement and Subject-Matter.*—Where one in a position to know assumes to have knowledge of the subject-matter of a contract, makes a material representation to another which induces him to sign it without being afforded an opportunity to ascertain them, the minds of the parties have not come to an agreement, and the party so induced may maintain his action to declare it void. The cases in which the representations were only promissory in character, not amounting to a factual representation, do not apply. *Ibid.*

29. *Contracts—Performance—Evidence — Acceptance.* — Parol evidence is competent to prove that the owner of a building contracted to be

CONTRACTS—*Continued.*

erected, accepted the building with full knowledge of its condition, where the contractor sues for the balance of the contract price, and the owner defends upon the ground that the plaintiff failed to erect the building as the contract required. *Moss v. Knitting Mills*, 644.

30. *Same—Waiver.*—Acceptance of a building under contract implies the owner's satisfaction therewith, and is a waiver of many rights. *Ibid.*

31. *Contracts — Damages — Evidence — Appeal and Error.* — Where a contractor to furnish labor and material and supervise construction of a building to be used as a yarn mill, sues to recover the balance due him under the contract: *Held*, under the facts in this case, evidence of defendant's loss from damage to yarns caused by a leak in the roof, etc., was properly excluded. *Ibid.*

32. *Contracts—Buildings—Skill Required.*—It is the duty of the contractor for the erection of a building to use ordinary skill only in its construction, unless a greater degree of skill is specially provided for by the contract. *Ibid.*

33. *Same—Substantial Performance—Damages.*—Where a contractor for the erection of a building has substantially complied with his contract, and the owner has accepted same, he is liable only as to minor details, under the contract in the instant case, the cost of putting the building in proper condition required by the contract. *Ibid.*

34. *Contracts—Parol Evidence—Written Contracts.*—Parol evidence is inadmissible to contradict, vary or add to the terms of a written contract, and is only competent to show such parts thereof as were not contained in the writing or intended so to be, when not in contravention of the Statute of Frauds. *Watson v. Spurrier*, 726.

35. *Same—Statute of Frauds—Principal and Agent—Lands.*—Where an agency for the sale of lands is created absolute and entire in form, with agreement on the part of the owner to convey the title within a specified time, it is incompetent for the owner to prove by parol evidence that it was on condition that others should likewise include their lands in the same locality as a whole, upon like conditions, at varying prices, the same being contradictory to the terms of the contract sued on and required by the Statute of Frauds to be in writing. *Ibid.*

36. *Contracts—Written Contracts—Ambiguity—Interpretation — Intent.* — The intention of the parties to a written contract as expressed by the entire instrument, in connection with the subject-matter, the surrounding and attendant circumstances and the object in view, control the interpretation of the contract when the language used therein is ambiguous or of doubtful import; and the words employed are given their ordinary meaning, when reasonably permissible, and if they have more than one meaning, the one will be accepted which appears to carry out the intent of the contracting parties. *King v. Davis*, 737.

37. *Contracts—Written Terms—Insurance—Policies — Extension Notes.* — Where the contract for the extension of the payment of the premium on a life insurance policy is clear, its valid stipulations as to the conditions of the extension note will be enforced in accordance with their terms. *Haywerth v. Ins. Co.*, 757.

CONTRACTS—*Continued.*

38. *Contracts — Consent Judgments — Pleadings — Demurrer — Banks and Banking—Deposits.*—Where in an action between husband and wife a consent judgment has been entered decreeing that two thousand dollars on deposit in the bank should equally belong to each, with the covenant by the husband that he would sign with his wife, at her request, all deeds for the conveyance of her separate lands, upon the wife's drawing the full deposit, she may not thereafter maintain that the husband had breached his contract in failing to sign her deeds, and successfully resist his recovery of his half of the deposit upon the ground that the contract was indivisible, and he had failed to allege his ability, readiness, etc., to pay her a certain sum of money likewise incorporated in the judgment. *Smith v. Smith*, 765.

39. *Contracts—Interpretation—Matters of Law—Courts.*—Where an entire contract is in writing, its interpretation is a matter of law exclusively for the court. *Ibid.*

40. *Contracts — Writing — Parol Agreements.* — Parol evidence is not admissible to contradict, add to, take away from or vary the terms of a written contract, and all verbal contemporaneous declarations and understandings are incompetent therefor, as the parties are to be presumed to have incorporated in the writing the provisions by which they intended they should be bound in connection with the subject-matter. *Lumber Co. v. Sturgill*, 776.

41. *Contracts—Fraud—Mistake.*—Where a party to the written contract is able to read and understand it, and nothing is said or done by the other party to mislead him as to its meaning, he is bound by the writing he has thus signed, and it may not be set aside for fraud or mistake. *Ibid.*

42. *Same—Equity—Rescission—Cancellation.*—In order to rescind or cancel a contract for fraudulent representations in its procurement, there must be a reasonable representation, express or implied, false within the knowledge of the party making it, reasonably relied on by the other party, and constituting a material inducement to the contract. *Ibid.*

43. *Contracts—Agreement as to Increase in Cost — Arbitration — Counterclaim.*—Where a party to a written contract agrees to cut and deliver timber at a certain price, with provision that it was subject to be changed upon the increase of the price of labor or other conditions therein by agreement or by arbitration, and a higher price is accordingly subsequently fixed in the place of that first definitely specified, the party may not thereafter wait until the completion of his contract, and as defendant in an action upon the contract price successfully set up a counterclaim that under the terms of his contract he was entitled to more money for his services upon the ground that the price reached by arbitration was insufficient to cover an increase in the cost to him in the performance of his contract. *Ibid.*

44. *Contracts—Married Women—Principal and Agent.*—A married woman is *sui juris* under our law to make a valid contract with an agent for the sale of lands. *Corbett v. Dorsey*, 783.

45. *Contracts—Quantum Meruit—Evidence—Damages—Instructions.*—In an action to recover compensation for the sale of land by an agent, the

CONTRACTS—*Continued.*

complaint alleged, and there was evidence tending to show and *per contra*, that defendant gave the sole agency therefor to the plaintiff, and that a commission of five per cent was to be paid him, and evidence of no fixed commission: *Held*, the plaintiff was entitled to his compensation if the defendant had sold the land to another, or through another agency, during the life of the contract, and an instruction upon the law relating to a recovery upon a *quantum meruit*, was not erroneous. *Ibid.*

46. *Same—Pleadings.*—A recovery upon a *quantum meruit* will not be permitted where the declaration is upon a special contract with a special price therein stated as the standard; but such recovery is permissible where the allegations are based upon a contract upon commission and also when the amount is not fixed and is broad enough to include a recovery upon a *quantum meruit*. *Ibid.*

47. *Contracts—Agreement—Offer and Acceptance.*—A valid contract is the agreeing together of the minds of the parties upon the subject-matter thereof, and where it is evidenced by a proposal and acceptance contained in a correspondence thereon, the acceptance must be unconditional. *Greene v. Jackson*, 789.

48. *Same—Letter—Correspondence—Leases—Cost of Construction of Building.*—Where a contract by correspondence for the renting of a certain floor of an office building to be erected, between the owner and his architect, the latter proposing to lease the offices of this floor at a certain per cent of the cost to the owner, the contractor to specifically name the cost thereof in his contract for the erection of the building, and later the owner writes that it was found to be impossible to arrive at the cost of this floor as agreed upon, but that they could doubtfully arrive thereat from the cost of materials and that of construction, a reply that the architect agreed to the proposition and would have to see the bill for materials, labor, etc., is an unconditional acceptance, the provision therein relating only as to the method necessary for him to ascertain the cost is immaterial. *Ibid.*

49. *Contracts—Public Policy—Immoral Contracts — Actions.* — A contract contravening sound public policy or *contra bonos mores* is void, and an action thereon may not be maintained in our courts. *Waggoner v. Publishing Co.*, 830.

CONTRACTS, WRITTEN. See Contracts.

CONTRIBUTORY NEGLIGENCE. See Employer and Employee, 4, 23; Negligence, 4, 13, 25.

CONTROVERSIES. See Removal of Causes, 3, 6.

CONVICTION. See Constitutional Law, 4.

CORPORATIONS. See Corporation Commission, 1; Actions, 1; Employer and Employee, 13.

1. *Corporations—Minutes of Meetings—Evidence—Presumptions.*—The recorded minutes of a stockholders meeting are presumed to cover their entire subject-matter, but it may be shown by parol evidence that they were fragmentary and incomplete as to material matters in controversy. *Motor Co. v. Scotton*, 194.

CORPORATIONS—*Continued.*

2. *Corporations—Contracts—Shareholders—Assent—Evidence.*—A contract will not be inferred as a matter of law to be that of the individual shareholders by reason of the want of assent of a majority thereof, and therefore not binding upon the corporation, when there is sufficient evidence to support the opposite view. *Fuller v. Service Co.*, 655.

3. *Corporations—Contracts—Shares of Stock—Sales—Repurchase—Insolvency—Receivers.*—Where a purchaser of stock of a corporation has agreed therewith that his stock would be purchased by the corporation in the event of his expressed dissatisfaction within two years, he may not enforce his agreement against creditors, etc., after the corporation is insolvent and is in the hands of a receiver. The validity of contracts of this character discussed by ADAMS, J. *Ibid.*

CORPORATION COMMISSION. See Actions, 8.

1. *Corporation Commission — Corporations — Judgment — Appeal and Error — Presumptions — Evidence — Burden of Proof — Cities and Towns—Franchise—Municipal Corporations.*—The Corporation Commission is empowered by statute to fix just and reasonable rates or charges for the services rendered by certain public service corporations, including water companies within the incorporated limits of a city or town, C. S., 2783, upon certain evidence specified by the statute, C. S., 1068, the rate so fixed being taken as prima facie just and reasonable, C. S., 1067; and where a user of the public service appeals to the court claiming the rates fixed by the commission were unreasonable or excessive, it is required of him to show by his evidence upon the trial the truth of his contention, and in the absence of such evidence it is not erroneous for the trial judge to instruct the jury to find in favor of the justness of the rates so fixed by the commission, though it appears that these rates were in excess of those fixed by the franchise of the public service corporation granted by the city or town. *Corporation Commission v. Water Co.*, 70.

CORROBORATIVE EVIDENCE. See Fires, 2; Homicide, 1.

COST. See Contracts, 43, 48.

COVENANTS. See Estates, 11.

COUNSEL. See Appeal and Error, 7, 30.

COUNTERCLAIM. See Statutes, 3; Taxation, 3; Contracts, 43; Offset, 1.

COUNTIES. See Officers, 1; Taxation, 3; Education, 2.

1. *Counties—State Highway Commission—Statutes—Loans—Contracts—Consideration—Questions of Law.*—In contemplation of the statute the State Highway Commission is entrusted to construct and maintain a system of public highways and to contract in reference thereto, and a contract made between this board and the board of commissioners of a county wherein the latter is to advance certain moneys as a proportionate expense in the former's taking over and maintaining a particular highway to be repaid by the State Highway Commission from its funds is a valid and legal contract, supported by a sufficient consideration. *Young v. Highway Commission*, 52.

2. *Counties—Government — Principal and Agent.* — Counties are governmental agencies of the State, and where there is no constitutional in-

COUNTIES—*Continued.*

hibition, are subject to the unlimited control of the Legislature as to the manner of their exercising their proper functions or the selection of agencies therein to be employed for the purpose. *S. v. Jennette*, 96.

3. *Same—Statutes—Legislative Powers—Vested Rights.*—The commissioners of a county duly elected and inducted have no vested right in their offices, and the same may be abolished by statute, and other instrumentalities for the administration of the county government substituted therefor, when not inhibited by our Constitution. *Ibid.*

4. *Same—Constitutional Law.*—Where a county has been given the full general authority for levying taxes and pledging the faith and credit of the county under our Constitution, the Legislature has the power and authority to change the agencies by which the proper execution of this power shall be exercised without further observing the constitutional requirement that a statute of this character shall be passed upon its various readings in each branch of the Legislature upon a roll-call requiring the recording of the "aye" and "no" vote of the members, etc. Const., Art. II, sec. 14. *Ibid.*

COUNTY COMMISSIONERS. See Constitutional Law, 1; Officers, 2.

COUNTY COURTS. See Appeal and Error, 28; Courts, 3, 5.

COURTS. See Officers, 1; Constitutional Law, 1, 5, 10; Health, 2; Equity, 6; Evidence, 10; Automobiles, 2; Pleadings, 5, 17, 18; Actions, 2, 15; Elections, 1; Contracts, 39; Quo Warranto, 1; Education, 2; Deeds and Conveyances, 16; Appeal and Error, 27, 32; Criminal Law, 8.

1. *Courts—Pleadings—Amendments — Appeal and Error.* — A motion to amend pleadings is addressed to the sound discretion of the trial judge, and his refusal therefor is not reviewable on appeal. *Saleeby v. Brown*, 139.

2. *Courts—Jurisdiction—Constitutional Law—Statutes.*—A court created by statute may not pass upon the constitutionality of the statute of its creation: and the jurisdiction being derivative, the Superior Court may not do so on appeal therefrom, or thus have the matter determined in the Supreme Court upon further appeal. *Chemical Co. v. Turner*, 471.

3. *Courts—Statutes—Process—County Courts.*—Where a county court is created by a legislative enactment, declaring that its process shall run as process issuing out of the Superior Court, which was by reading the summons to the defendant, an exception by defendant to the legality of such service for failure to leave a copy with him is untenable. The provisions of ch. 520, Public Laws of 1915, amended by ch. 92, Public Laws, Extra Session, 1921, are not applicable in such instances. *Ibid.*

4. *Courts—Judgments—Inherent Powers.*—At common law, the power to vacate judgments contrary to process of courts apparent upon the record, is inherent in the court rendering it. *Fowler v. Fowler*, 536.

5. *Courts—Appeal from County Court to Superior Court—Statutes—Judgments—Motions—Appeal and Error.*—Where the statute provides for an appeal from the county court to the Superior Court for errors assigned in matters of law, in the same manner and under the same

COURTS—*Continued.*

requirements as are provided by law for appeals from the Superior to the Supreme Court, etc., upon the refusal of the county court judge to set aside a judgment of his court for surprise or excusable neglect, the Superior Court is without jurisdiction to find additional facts as to a meritorious defense in this case, and thereon grant the relief prayed for in the motion. *Cook v. Bailey*, 599.

6. *Courts—Argument to Jury—Grossly Abusive Language.*— Where the language of an attorney in his address to the jury is unwarranted and grossly abusive, it is reversible error for the trial judge to fail to correct the attorney using the language, upon objection and exception by the opposing party. The duty of the trial judge in such instances pointed out by STACY, C. J. *S. v. Tucker*, 708.

7. *Courts—Sound Discretion—Appeal and Error.*—The discretion of the trial judge given him over the trial of a cause is rarely interfered with, though his action may be set aside for such gross abuse as would invade the legal rights to the prejudice of the appealing party; and under the facts in this case it is held that no abuse of this discretion or the invading of defendant's constitutional rights (N. C. Const., Art. I, secs. 11 and 17), was made to appear on the trial. What is in law the meaning of sound discretion of the trial judge, pointed out by ADAMS, J. *S. v. Sauls*, 810.

8. *Courts—Jurisdiction—Constitutional Law—Special Terms—Judge Appointed—Judge of District—Criminal Law—Capital Felony.*—Objection by the defendant charged with a capital felony to the authority of the judge assigned by the Governor of the State to hold a special term of the Superior Court, upon the ground that the judge assigned to hold the courts of the district was in good health, and holding a term of the court in another county within the district, cannot be sustained as repugnant to or unauthorized by our State Constitution, Art. IV, sec. II. *S. v. Montague*, 841.

COVENANTS. See Deeds and Conveyances, 1, 4, 5, 23.

COWS. See Health, 1.

CRIMINAL LAW. See Evidence, 10, 31; Constitutional Law, 4; Employer and Employee, 11; Indictment, 1, 2; Actions, 5; Fires, 1; Appeal and Error, 35; Homicide, 5; Courts, 8; Municipal Corporations, 17.

1. *Criminal Law—Assault and Battery—Statutes—Instructions—Expression of Opinion.*—On a trial under a criminal indictment the burden is on the State to show beyond a reasonable doubt the ingredients or elements necessary to constitute the statutory offense, or the lower degree of the same crime for which a verdict is permissible and where assault and battery, prohibited by C. S., 4213, are charged, the State must accordingly show that it was maliciously done with a deadly weapon, secretly by waylaying or otherwise, etc., with intent to kill, and when the evidence is conflicting, it is an expression of opinion inhibited by C. S., 564, for the judge to charge the jury that if they believe the evidence, a cold-blooded and cruel assault had been committed. *S. v. Kline*, 177.

2. *Criminal Law—Escape—Statutes.*—Where a prisoner has been lawfully confined in a jail, and by the aid of one on the outside succeeds during

CRIMINAL LAW—*Continued.*

the night in breaking through and leaving his cell but remains within the outside corridor of the jail until found by the officers of the law, a legal escape had not been effected. *S. v. Carivey*, 319.

3. *Same—Indictment—Attempt.*—Where the bill of indictment charges that the defendant gave assistance to one in lawful confinement by a direct ineffectual act done towards the commission, with intent to effect his escape, and by explicit language shows an attempt to rescue, the word "attempt" need not be set out in the indictment. *Ibid.*

4. *Same.*—An attempt to commit a crime is an indictable offense. The indictment charges an attempt to rescue. *Ibid.*

5. *Criminal Law—Worthless Checks—Indictment—Demurrer—Banks and Banking.*—In order to charge a statutory offense under the criminal law, the indictment should set forth all the essential requisites therein prescribed, and no element should be left to inference or implication, and where the indictment is defective a demurrer is good. *S. v. Edwards*, 322.

6. *Same—Indictment.*—In order for an indictment to be sufficient to charge the unlawful giving of a check upon a bank under the act of 1925, it is required that the charge not only be made that the maker of the check had insufficient funds on deposit there to meet the check, but among other things the indictment must charge that he had insufficient credits, etc., as the statute provides, and this provision is not affected by the prerequisite that the maker should have had the ten days notice, etc. *Ibid.*

7. *Criminal Law—Homicide—Evidence—Questions for Jury.*—Where the witness has pleaded guilty of murder in the second degree in connection with the homicide for which the defendant was on trial, the weight and credibility of her testimony is for the jury to determine, having a right to believe all or a part of her evidence. *S. v. Steele*, 506.

8. *Criminal Law—Appearance of Defendant—Witnesses—Evidence—Appeal and Error—Objections and Exceptions—Courts.*—Upon the trial of a criminal action for the violation of our prohibition law, it is reversible error, over the defendant's objection aptly made, for the trial judge to permit without correction, the prosecuting attorney to argue to the jury that the defendant, who had not taken the stand, looked like a professional bootlegger, and his looks were sufficient to convict him of the offense charged. *S. v. Tucker*, 708.

9. *Criminal Law—Presumption of Innocence—Witnesses—Statutes.*—The legal presumption in favor of the defendant in a criminal action, goes with him throughout the trial, and under our statute, his failure to take the witness stand in his own behalf shall not prejudice him. C. S., 1799. *Ibid.*

CROSS-ACTIONS. See Divorce, 1.

CROSS-EXAMINATIONS. See Evidence, 28, 35.

CUMULATIVE EVIDENCE. See Reference, 3.

DAMAGES. See Guardian and Ward, 1; Injunction, 3; Bills and Notes, 7; Nuisance, 1; Insane Persons, 1; Deeds and Conveyances, 1, 7; Sheriff, 1;

DAMAGES—*Continued.*

Contracts, 5, 7, 18, 31, 33, 45; Bailment, 2; Judgments, 4; Pleadings, 8; Highways, 1; Evidence, 17, 23; Actions, 11; Negligence, 14; Employer and Employee, 18; Estates, 11; Municipal Corporations, 10, 14; Statutes, 11; Instructions, 12.

DANGER. See Employer and Employee, 2, 18, 19.

DEATH. Negligence, 5; Judgments, 15.

DEBT. See Contracts, 6; Executors and Administrators, 1; Actions, 4.

DEBTOR AND CREDITOR. See Banks and Banking, 2; Deeds and Conveyances, 11.

DECEASED PERSONS. See Evidence, 8.

DECISIONS. See Deeds and Conveyances, 23.

DECLARATIONS. See Insane Persons, 2.

DEDICATION. See Municipal Corporations, 6.

DEEDS AND CONVEYANCES. See Judgments, 1; Estates, 1, 5, 6, 15, 17; Contracts, 3; Dower, 3; Equity, 1; Injunction, 5; Trusts, 2; Statute of Frauds, 1; Limitation of Actions, 2.

1. *Deeds and Conveyances—Covenants—Warranty—Damages.*—In an action to recover damages for a breach of warranty in a deed to lands upon the ground that defendant's grantee, the plaintiff, had received complete reimbursement in the sale of the lands to another to the extent of the purchase price: *Held*, the covenant of seizin does not run with the land, and is broken when the deed is delivered if the grantor does not own the land at the time of his covenant, and the right of action accrues only to his grantee. *Newbern v. Hinton*, 108.

2. *Same—Equity.*—In an action for damages for breach of warranty of seizin of lands: *Held*, no equity arises for defendant when it appears that the grantee, plaintiff, has since sold the land to another, and the difference in the purchase price paid to defendant and the purchase price received is more than the amount in suit. *Ibid.*

3. *Deeds and Conveyances—Warranty—Breach—Choses in Action.*—Where a covenant of seizin in a deed to land is broken, it becomes a chose in action, and is not assignable. *Ibid.*

4. *Deeds and Conveyances—Covenants—Warranties—Heirs at Law—Purchaser—Fraud—Notice.*—Where a defendant in an action for damages for breach of covenant in a deed to lands is one of the heirs at law of the deceased owner, and has obtained the title of the others by deed from them with knowledge of a probable caveat, he cannot maintain that he is a purchaser for value without notice of the defect in the title he has undertaken to convey. *Ibid.*

5. *Deeds and Conveyances—Covenants—Warranty—Breach—Measure of Damages.* In an action to recover damages for breach of covenant of warranty of title to lands upon allegation of part failure of title, or for the proportion of the original purchase price represented by the failure of title, the rule of damages recoverable is that proportionate

DEEDS AND CONVEYANCES—*Continued.*

part of the purchase price affected by the failure of complete title, with interest thereon, when the outstanding interest has not been bought in by the plaintiff. *Ibid.*

6. *Deeds and Conveyances—Evidence—Recitals—Admissions.*—The recitals in a deed from the common source of title of a valuable consideration paid for the lands, if uncontradicted by the evidence, is regarded as an admission of the parties. *Rook v. Horton*, 181.

7. *Deeds and Conveyances—Warranty—Breach—Damages.*—In order to maintain an action on a breach of warranty in a deed, the complainant must show his eviction or some injury in respect to the title conveyed to him, before action commenced. *Baggett v. Smith*, 354.

8. *Same.*—Under an executor's deed to lands without a warranty, the grantee cannot recover as damages against him an amount he claims to have lost by reason of defective title and his consequent failure to sell to another at a profit. *Ibid.*

9. *Deeds and Conveyances—Gifts—Remainders — Contingent Estates.* — Under a deed of gift of lands from a father to his son with contingent limitation over to the issue of another son, in the event the former should die without issue, the limitation over is not to the heirs general, but to the children who take on the happening of the contingency which would divest the title of the first taker, and where this contingency has happened and the estate goes over to the contingent remainderman, the latter takes from the grantor under the deed. C. S., 1654, Rule 4. *Stevens v. Wooten*, 378.

10. *Same—Repugnancy.*—A deed of gift from the father to the son in the granting clause in fee, and later in the same conveyance to the issue of another of his sons upon contingency, the two clauses of the deed will not be construed as repugnant to each other but to carry out the intent of the testator upon the happenings of the contingency; and a charge upon the profits of the lands for the support of the grantor will not affect the result. *Ibid.*

11. *Deeds and Conveyances—Fraud—Debtor and Creditor—Trusts.* — The principles of law that will avoid a deed to lands for fraud against the grantor's creditors, does not apply to lands held by the grantor in a resulting trust. *Tire Co. v. Lester*, 411.

12. *Same—Evidence—Directing Verdict — Nonsuit — Appeal and Error.* — Where in a suit to set aside a deed to lands brought by the creditors of the grantor, the evidence is conflicting as to whether or not he held the naked legal title, or in resulting trust for another, an instruction directing a verdict upon the evidence in plaintiff's favor, is reversible error. *Ibid.*

13. *Deeds and Conveyances—Interpretation—Conditions Subsequent.*—The entire instrument will be looked to in interpreting the intent of the grantor in a conveyance of land upon conditions subsequent that may work a forfeiture and right of reëntry. *Shields v. Harris*, 521.

14. *Same—Trusts—Cessation of Personal Trust—Actions — Parties.* — The right to enforce a trust rests only with the trustees or *cestui que trust*, or those having an interest therein, and where lands are conveyed to trustees for the purpose of its use as a burial ground, reserving the

right in the grantor to bury or permit the burial of certain ones he may designate, the reservation of this right is personal to the grantor, and ceases at his death. *Ibid.*

15. *Same—Interests.*—The doctrine of following a trust fund only permits one who has an interest therein to maintain an action to recover the funds, or the property purchased with the trust funds. *Ibid.*

16. *Same—Statutes—Courts—Jurisdiction—Equity—Cemeteries — Burial—Police Powers.*—The rights of burial are peculiar and somewhat of a public nature, subject to the police powers, and the Legislature and the courts, according to jurisdiction, may authorize a sale of lands granted for the purpose of burial of the dead, where the city has enlarged and grown around the property, and provided another place for the burial of the bodies. *Ibid.*

17. *Same—Equity.*—Equity will not enforce a trust in violation of a valid statute applicable to its subject-matter. *Ibid.*

18. *Deeds and Conveyances—Registration—Trusts — Mortgages — Liens — Judgments—Priorities—Statutes.*—Where a deed of trust to secure certain bonds upon the lands has been duly registered, and contains the provisions that the lands may be sold in part by the trustor, and with the consent of the trustee who is to receive the purchase price and apply on the bonds secured by the instrument, one who has purchased a part of the lands and paid part of the purchase price to the trustee who has paid it on the secured bond but has not joined in the deed by trustor and the trust deed is uncanceled of record the docketing of a judgment against the trustor before the party to whom trustor conveyed part of land without consent in writing of trustee—purchaser who paid the purchase price, is entitled to the relief sought in his suit, to have the judgment canceled to the extent that it is a cloud upon the title to his land thus conveyed to him. C. S., 614. *Boyd v. Typewriter Co.*, 794.

19. *Same—Title.*—Where lands are conveyed to a trustee to secure mortgage notes thereon, with provision that with the consent of the trustee the lands may be sold in parcels and the proceeds applied to the mortgage notes: *Held*, the title remains in the trustee subject to the provisions in the deed, and the legal title remains in him under the trusts imposed by the instrument. *Ibid.*

20. *Same—Parties—Judgments.*—Where there is a compliance with the conditions by the *cestui que trust* in the trust deed, the trustee, a party to the suit to remove the lien of a judgment as a cloud upon the title to lands, will be decreed when this remedy is appropriate. *Ibid.*

21. *Deeds and Conveyances — Registration — Consideration — "Color."* — Where a conveyance of lands is without valuable consideration, the grantee cannot invoke the registration statute (Connor Act) to declare a prior registered deed to the same lands was not "color" of title. *Anderson v. Walker*, 826.

22. *Deeds and Conveyances—Restrictions—Suits—Actions — Parties — Injunction.*—Restrictions in a land development and contained in the original deeds as to the number of buildings to be placed upon the lot

DEEDS AND CONVEYANCES—*Continued.*

sold, are covenants running with the lands, and each grantee of such lands may enjoin all other such grantees from violating the restrictions. *Johnston v. Garrett*, 835.

23. *Deeds and Conveyances—Restrictions—Covenants—Review—Evidence—Records—Former Decisions.—Held*, in the Supreme Court, from the record in this case, and the opinion in a former case upon the same subject-matter herein, "Myers Park" land was originally sold and conveyed under a general improvement plan and that the deeds containing certain restrictions as to buildings included the *locus in quo*. *Ibid.*

DEFAULT. See Judgments, 4.

DEFECTS. See Judgments, 7.

DELAY. See Carriers, 5.

DELEGATION OF POWER. See Constitutional Law, 1.

DELIVERY. See Vendor and Purchaser, 1.

DEMAND. See Carriers, 7.

DEMURRER. See Pleadings, 1, 5, 7, 9, 10, 12, 13, 17; Contracts, 3, 38; Criminal Law, 5; Banks and Banking, 4; Schools, 2; Actions, 17.

1. *Demurrer—Pleadings.*—Upon demurrer to the sufficiency of the allegations of the complaint to state a cause of action, the allegations are taken as admitted. *Greene v. Jackson*, 789.

DENIALS. See Pleadings, 16.

DEPOSITS. See Banks and Banking, 2, 8; Contracts, 38.

DESCENT AND DISTRIBUTION. See Wills, 5; Dower, 5.

1. *Descent and Distribution—Heirs—Widow—Statutes.*—The estate of a deceased husband is cast upon his widow as his heir only when there are no other lawful heirs. C. S., 1654. *Bryant v. Bryant*, 372.

2. *Same—Illegitimate Children.*—Under Rule 10, of Descent, where an illigitimate son has married, leaving surviving illegitimate brothers and sisters of the same mother, they may collaterally inherit the estate under the provisions of C. S., 1654, and the inheritance cannot be cast upon his surviving widow, as his heir. C. S., 1654. Canon 13 of Descent has no application. *Ibid.*

DEVISES. See Wills, 1; Equity, 10; Estates, 9, 11, 17.

DIRECTING VERDICT. See Deeds and Conveyances, 12; Evidence, 18; Executors and Administrators, 3; Negligence, 25.

DISCHARGE. See Bills and Notes, 9.

DISCONTINUANCE. See Actions, 18; Process, 3.

DISCOVERY. See Evidence, 11.

DISCRETION. See Education, 2.

DISCRETION OF COURT. See Constitutional Law, 3; Reference, 3; Pleadings, 20; Trials, 1; Taxation, 6; Courts, 7.

DISCRIMINATION. See Health, 1; Constitutional Law, 3.

DISMISSAL. See Appeal and Error, 17; Actions, 15.

DISSOLUTION. See Partnership, 1.

DISTRICT. See Courts, 8.

DIVERSE CITIZENSHIP. See Removal of Causes, 3.

DIVIDENDS. See Banks and Banking, 2; Partnership, 1.

DIVORCE. See Judgments, 14.

1. *Divorce—Marriage—Separation—Statutes — Actions — Cross-Actions.*— The defendant in an action for divorce *a vinculo*, may file a cross-action for the same relief, and where no reply has been filed by the plaintiff, and no evidence offered by him, an issue is raised by our statute (C. S., 1662), and upon a verdict on the required issues, a judgment may be rendered upon the cross-action if the pleadings and evidence are sufficient. *Ellis v. Ellis*, 418.

2. *Same—Issues—Residence—Judgment.*—For the granting of a divorce for the five-year separation of husband and wife under the provisions of our statute, C. S., 1659 (4), there must not only be evidence but a determinative issue answered in the affirmative as to the necessary period of residence, and a judgment rendered upon an issue establishing only a two years residence in this State by the plaintiff is insufficient, and a judgment signed thereon improvidently rendered. The changes made by the Public Laws of 1925 commented upon by STACY, C. J. *Ibid.*

3. *Same—Partial New Trial—Appeal and Error.*—Where a judgment has been entered granting a divorce *a vinculo* on the grounds of separation of husband and wife for five years, C. S., 1659 (4), in the absence of finding of the necessary issue as to plaintiff's residence, a motion in the cause to correct this error or omission is proper, and where such appears to be the only and unrelated error committed, the case will be remanded for the submission of this issue only. *Ibid.*

DOCKETING. See Appeal and Error, 7; Liens, 1.

"DOING BUSINESS." See Comity, 3.

DOWER. See Wills, 5; Estates, 14.

1. *Dower—Parol Trusts—Marriage.*—Dower in her husband's land after his death cannot be assigned to his wife if he had only the naked legal title at the time of his death, and no beneficial interest therein is descendible to his heirs at law in case of intestacy, as where a valid parol trust therein had been created by the testator in favor of his children by his first marriage being of age, upon an expressed agreement that they would purchase the land with the returns from their joint labor, reserving a life estate for the father, in whose name alone the legal title had been taken, and the dower is thereafter claimed by his second wife. *Pridgen v. Pridgen*, 102.

DOWER—*Continued.*

2. *Dower.*—The right of dower arises to the wife in the lands of her deceased husband as a matter of law, not arising by contract, and the widow does not take as a purchaser for value, and the principle that marriage is a valuable consideration does not apply. *Rook v. Horton*, 180.

3. *Dower—Deeds and Conveyances—Registration.*—A deed of gift of lands registered after the marriage or made thereafter, is not good as against the widow's right of dower, and the grantee therein is not a purchaser for value. *Ibid.*

4. *Dower—Color of Title—Adverse Possession—Limitation of Actions.*—The widow's dower in the lands of her deceased husband is but an elongation of his estate, and where this right is inchoate (during his life), the wife is not put to her action by his conveyance of the land, and the same is not color of title until his death, and may not be ripened into an indefeasible title by adverse possession prior thereto. *Ibid.*

5. *Dower — Estates — Descent and Distribution.* — The widow's right to dower rests upon the theory that during coverture her deceased husband died intestate, seized of an estate which any child she may have borne him might have taken by descent. *Alexander v. Fleming*, 815.

DRAINS. See Municipal Corporations, 11.

1. *Drainage Districts—Assessments—Liens—Actions—Parties—Statutes.*—The assessment of owners of land in a drainage district given by chapter 348, Public-Local Laws of 1913, amended by chapter 107, Public-Local Laws of 1925, is a lien *in rem*, and enforcible in equity, in analogy to the enforcement of a tax lien, by an action by the commissioners of the district: and the position that the sole method is by the sheriff, etc., under proceedings under the provisions of the act itself, is untenable. C. S., 7990. *Commission v. Epley*, 672.

DRUNKENNESS. See Homicide, 5.

"DUE COURSE." See Bills and Notes, 7.

DUE PROCESS OF LAW. See Constitutional Law, 2.

DUTIES. See Employer and Employee, 10.

DYNAMITE. See Employer and Employee, 18.

EASEMENTS. See Waters, 1; Statute of Frauds, 1.

EDUCATION. See Pleadings, 14; Schools, 2, 4.

1. *Education—Public Schools—Playgrounds—Condemnation—Statutes.* — Under the provisions of C. S., 5416, the board of education of a county may acquire for public school purposes lands not exceeding two acres for the necessary buildings for the school, including playgrounds for the scholars, and having acquired by deed a portion of the necessary lands may afterwards acquire by condemnation additional and adjoining lands, not exceeding the statutory limitation, when in the sound discretion of the school board they appear necessary for the

EDUCATION—*Continued.*

purposes of the school. This section is not affected by C. S., 5469 (vol. III), as to limiting the board to acquire such property for the school building sites, etc., only by condemnation. *Board of Education v. Forest*, 753.

2. *Same—County Board of Education—Discretionary Powers—Courts.*—The county board of education in acquiring by condemnation additional lands to be used as a playground to a public school, acts within its sound discretion, with which the courts seldom interfere. *Ibid.*

EJECTMENT. See Contracts, 23; Landlord and Tenant, 1.

1. *Ejectment—Leases—Landlord and Tenant—Evidence — Questions for Jury—Title.*—While the defendant in summary ejectment may not deny the title to the property of the one under whom he obtained possession while continuing therein, it is competent for him to show by his evidence that in fact he rented from and entered possession under another. *Perry v. Perry*, 125.

ELECTIONS. See Counties, 1; Quo Warranto, 1.

1. *Elections—Public Office—Statutes—Results—Judicial Acts—Quo Warranto—Court's Judisdiction.*—The act of the county canvassers in declaring the result of an election to public office, C. S., 5986, cannot have the effect of ousting the jurisdiction of the Superior Court in *quo warranto* or information in the nature thereof. *Harkrader v. Lawrence*, 441.

2. *Same—Appeal and Error—Objections and Exceptions.*—Objection to the counting of ballots and for a ruling thereon by the registrar and judges of election, to a public office, is not a condition precedent to the maintenance of *quo warranto*, etc., in the Superior Court. *Ibid.*

ELECTRICITY. See Evidence, 1; Employer and Employee, 9; Pleadings, 14; Schools, 2; Negligence, 22, 24.

1. *Electricity — Transmission Lines — Right of Way — Negligence — Evidence—Nonsuit—Railroads.* — An electrical transmission power company is answerable in damages for a fire set out on its right of way, proximately caused by its negligence in permitting it to remain in an inflammable condition, under the decisions applying in like cases to railroad companies. *Lawrence v. Power Co.*, 665.

EMPLOYER AND EMPLOYEE.

1. *Employer and Employee—Master and Servant—Negligence—Safe Place to Work.*—The duty of an employer in the exercise of reasonable care to furnish to his employee a reasonably safe place to work in the course of employment, is nondelegable, and he may not escape liability when a negligent personal injury has been inflicted on an employee by another having charge of the work. *Riggs v. Mfg. Co.*, 256.

2. *Same—Dangerous Employment—Warning of Danger.*—Where the duty of an employee is to make a clearing or passway in the woods for others who are felling trees therein, and upon the falling of a nearby tree he seeks to escape injury by fleeing, and falls and injures himself by being cut with an axe or bush hook he had been using: *Held*, under the circumstances it was evidence of the employer's negligence, that he had failed to give the injured employee timely warning of

EMPLOYER AND EMPLOYEE—*Continued.*

his danger is within the rule requiring the employer to furnish his employee a reasonably safe place to work, and sufficient to take the case to the jury upon the issue of negligence. *Ibid.*

3. *Same—Insurer.*—The liability of an insurer does not come within the rule requiring the employer to furnish his employee a safe place to work, for he is only to exercise such reasonable care under existing conditions to provide such place and supply him machinery, implements and appliances suitable for the work in which he was engaged, and to keep them in safe condition by the exercise of proper care and supervision. *Ibid.*

4. *Same—Contributory Negligence—Burden of Proof.*—Where contributory negligence is pleaded with supporting evidence in a negligent personal injury case, and tends to show that plaintiff received the injury complained of while in imminent peril, the burden is on defendant to show that under the existing circumstances the plaintiff had acted in disregard to his own safety, and it is not required of him that he should have selected the less dangerous way to have escaped the injury. *Ibid.*

5. *Employer and Employee—Negligence—Independent Contractor — Safe Place to Work.*—An employee of an independent contractor to haul timber from the woods and load cars at a certain price per thousand, with implements and machinery of the defendant engaged in this business, is to be regarded as an employee of the defendant in respect to exercise of reasonable care in furnishing safe appliances to do the work, etc., and make the defendant liable for a negligent defect in the machinery that proximately caused the injury, the subject of the action for damages. *Paderick v. Lumber Co.*, 308.

6. *Employer and Employee—Master and Servant—Negligence—Evidence—Nonsuit.*—Upon motion to nonsuit in an action to recover damages for the negligent killing of plaintiff's intestate, an employee of defendant corporation, it is reversible error to grant defendant's motion as of nonsuit upon the grounds that the intestate had borrowed the truck upon which he met his death, when there is further evidence that his employer had furnished the truck to plaintiff and other employees for going to and from their work, and it was under its control at the time of the accident that inflicted the negligent injury. *Williams v. R. R.*, 366.

7. *Same—Appeal and Error.*—In an action against an employer and a railroad company to recover damages for the negligent killing of plaintiff's intestate in a collision between a truck driven by a co-employee at the time of his death and the train of the defendant railroad company, with evidence tending to show that the truck was being driven in the service of the employer, and per *contra*, it is reversible error for the trial judge to instruct the jury that any negligence of the driver was attributable to plaintiff's intestate. *Ibid.*

8. *Employer and Employee—Master and Servant—Negligence—Evidence—Safe Place to Work.*—It is the primary and nondelegable duty of the master, in the exercise of ordinary or reasonable care, to furnish or provide for his servant a reasonably safe and suitable place in which to work in the performance of dangerous duties, within the scope of his employment. *Barnes v. Utility Co.*, 382.

EMPLOYER AND EMPLOYEE—*Continued.*

9. *Same—Electricity.*—Where the defendant employer is engaged in the construction of a water-driven electrical plant, and through its vice-principal or *alter ego*, instructs the plaintiff's intestate in his own way as best he could to repair a roof of the house at the dam in which the water gates were operated by electricity, and through which, near the top, wires carrying a heavy voltage of electricity passed, and the evidence is conflicting as to whether the roof could have been safely fixed from on top or beneath where the heavily electrically charged wires were placed, and that the intestate, working from within the building, came in contact with these wires resulting in his being electrocuted by the current not having been turned off as it should have been done by the employer, in such instances: *Held*, under the facts of this case, the employee had the right to have relied upon his employer's having performed this duty, and is sufficient evidence of the employer's actionable negligence to deny defendant's motion for judgment as of nonsuit. *Ibid.*

10. *Same—Scope of Employee's Duty.*—While an employer is not liable when his employee departs from his line of duty and comes in contact with live wires under its care and control, the principle does not apply when the employee is instructed to do a dangerous duty in his own way, or as best he could and is injured in a reasonable pursuance thereof, proximately caused by his employer's negligence in failing to provide a reasonably safe place for him to work. *Ibid.*

11. *Employer and Employee—Master and Servant—Principal and Agent—"General Manager"—Criminal Law.*—One employed as "general manager" of a local branch of a chain of stores operated in several towns, impliedly at least has the control thereof in his locality, with reference to its local employees, and his acts with respect to them are held to be those of the corporation he thus represents. *Kelly v. Shoe Co.*, 406.

12. *Same—Torts—False Arrest—Respondeat Superior.*—Where there is evidence that the local "general manager" has had an employee or salesman at his principal's store falsely arrested and imprisoned for the embezzlement of his employer's funds, it is sufficient to be submitted to the jury upon the issue of the employer's liability therefor in an action for damages. *Ibid.*

13. *Same—Corporations.*—A corporation is liable for the torts of its employees or servants committed in its behalf within the scope of their employment as in case of individuals. *Ibid.*

14. *Employer and Employee—Master and Servant—Commerce—Railroads—Federal Statutes.*—In an action to recover damages for the alleged negligent killing of plaintiff's intestate, where it is admitted by the pleadings that the defendant was a common carrier by railroad, and engaged in interstate commerce at the time of the killing, and the intestate was employed by the defendant in such commerce, the defendant's liability is determinable under the Federal statute. *Wimberly v. R. R.*, 444.

15. *Employer and Employee — Master and Servant — Negligence — Commerce—Federal Employers' Liability Act—Evidence—Nonsuit.*—Where there is evidence that the plaintiff's intestate was employed, as a

EMPLOYER AND EMPLOYEE—*Continued.*

part of his duty to a railroad company, to throw the switches to pass the trains from the main line to a siding for the passage of another train, under the custom of slowing down the train before reaching the switch, the passing of the switchman along the side of the locomotive, jumping from the pilot of the engine to the ground, running ahead and opening the switch to allow the passing of the train without stopping; that at the time in question the pilot was covered with frost and particularly dangerous for this purpose, and that the plaintiff's intestate fell to his death under the implied order of the engineer, the defendant's vice-principal, at a time when the engine made a sudden jerk or movement: *Held*, upon a motion by defendant as of nonsuit, the evidence was sufficient to warrant the jury in finding that the plaintiff's intestate was negligently permitted or directed to act as he did, and to deny said motion, and permit the inference of defendant's actionable negligence. *Ibid.*

16. *Same—Assumption of Risks.*—The doctrine of assumption of risks has no application to cases arising when the negligence of a fellow-servant or coemployee, which the injured party could not have foreseen or expected, is the sole, direct and immediate cause of the injury. *Ibid.*

17. *Employer and Employee — Master and Servant — Pleadings — Admissions—Negligence—Instructions.*—In an action to recover damages for the negligence of the one driving defendant's automobile, the admission in the answer to the allegation in the complaint that he was the defendant's local manager, and was driving at the time of the alleged negligent injury home from performing his duties to the defendant, and using the automobile in connection therewith, is an admission of his agency that will bind the principal for his negligent act. *Fleming v. Holleman*, 449.

18. *Employer and Employee—Master and Servant—Blasting—Dynamite—Dangerous Instrumentalities—Negligence—Damages.*—The contractor for the building of a public highway for the highway commission of a county may not escape liability for the negligent failure of its independent subcontractor to furnish his employee a reasonably safe place to work, and appliances therefor, in the performance of his duty in blasting the roadway when necessary for its completion in accordance with the original contract. *Greer v. Construction Co.*, 632.

19. *Employer and Employee—Master and Servant—Dangerous Employment—Sufficient Help—Tools and Appliances—Safe Place to Work.*—Where, under the direction of the defendant's vice-principal, an employee is injured in the course of his employment in "ball-hooting" logs, *i. e.*: causing them to slide down a declivity on the ground, one side being peeled or skinned, to be further transported, and there is evidence tending to show that he was inexperienced therein and was injured in consequence of the failure of his employer to furnish sufficient help ordinarily required, and certain implements used in such work of a simple nature: *Held*, sufficient evidence of the defendant's actionable negligence to take the issue to the jury. *Bradford v. English*, 742.

EMPLOYER AND EMPLOYEE—*Continued.*

20. *Same—Nondelegable Duty.*—It is a nondelegable duty of the employer to exercise ordinary care to furnish his employee suitable help and tools and appliances with which to do dangerous work within the scope of his employment. *Ibid.*

21. *Same—Implied Notice.*—An employer of labor is held with notice of the customary and reasonable requirements necessary for his employee to perform, with reasonable safety, a duty within the scope of his dangerous employment, such as are ordinarily observed by other employers in like circumstances. *Ibid.*

22. *Same—Nondelegability of Employer's Duty.*—The duty of an employer to furnish his employee a reasonably safe place to work, sufficient help and proper appliances, may not be shifted by intrusting this duty to the control of another employee. *Ibid.*

23. *Employer and Employee—Master and Servant—Negligence—Contributory Negligence—Evidence—Nonsuit.*—*Held,* upon a motion to nonsuit under the facts of this case, an employee, in the discharge of a dangerous duty he owed to an employer was not barred of his recovery for the defendant's negligence by his alleged negligent failure to guard against a personal injury, under the circumstances of this case. *Ibid.*

24. *Employer and Employee—Master and Servant—Negligence—Safe Place to Work—Tools and Appliances—Instructions—Appeal and Error—Reversible Error.*—The requirement of an employer to furnish his employee a safe place to work within the scope of his employment, and suitable tools and appliances with which to perform it, is such only as requires ordinary care in relation to the surroundings; and an instruction upon the issue of negligence that such was the employer's absolute duty, is reversible error. *Lindsey v. Lumber Co.*, 844.

ENDORSERS. See Bills and Notes, 2.

ENDORSEMENT. See Banks and Banking, 5; Carriers, 2.

ENTRY. See Contracts, 23; Evidence, 39; Estates, 10.

EQUITY. See Deeds and Conveyances, 2, 16, 17; Principal and Surety, 2; Bills and Notes, 5; Injunction, 5; Constitutional Law, 5, 10; Estates, 7; Removal of Causes, 1; Contracts, 42.

1. *Equity—Deeds and Conveyances—Reformation—Evidence.*—Equity will not reform a deed into a mortgage for mistake upon evidence tending only to show that after considering the matter, the parties intended the instrument to be a deed, as it was finally written. *Perry v. Surety Co.*, 284.

2. *Same—Principal and Surety—Contracts.*—Where the surety on a contractor's bond and the contractor have agreed that the contractor will save the surety harmless on account of any default under his contract with whatever property he may have in the way of tools, appliances and materials on hand, and thereafter under a separate agreement expressly referring to the original surety contract, the contractor conveys certain of his realty encumbered by a mortgage, the transactions will be construed together in their entirety to effectu-

EQUITY—*Continued.*

ate the intent of the parties, and accordingly the deed will be given effect as a mortgage security under the original contract of surety, and not an absolute conveyance. *Ibid.*

3. *Equity—Marshaling Assets.*—The doctrine of marshaling assets is purely an equitable remedy, arising when one of two creditors of a common debtor has security for the payment of his debt in addition to that of the other, in which case he is required by good conscience to first resort thereto, to the end that both creditors may be paid out of the security pledged; and where all the parties are before the court, judgment may be rendered accordingly. *Trust Co. v. Godwin*, 512.

4. *Equity—Marshaling Assets—Liens — Mortgages — Bills and Notes — Guarantor of Payment.*—Where the holder of a first registered mortgage lien on lands and the mortgagor agree that the lien thereof shall be a second one to a lien thereafter acquired, and in consideration thereof and has sold the first registered mortgage note, with his guaranty of payment, to another, and the holder of the first lien has neither actual nor constructive notice of the agreement as to the lien, all parties being before the court: *Held*, the purchaser of the note without notice of the agreement, acquires a first lien, or a priority of payment out of the proceeds of the sale of the land, and the residue, as far as it will extend, to be applied to the satisfaction of the second registered mortgage. *Ibid.*

5. *Equity—Subrogation—Mortgages—Purchasers.*—Equity subrogates the purchaser from the mortgagor of lands holding the equity of redemption to the rights of the mortgagor to clear the title, by payment of the mortgage debt and to procure the legal estate to the mortgaged premises. *Dameron v. Carpenter*, 595.

6. *Same—Courts—Jurisdiction.*—Under our statutory procedure, wherein law and equity are administered in the same tribunal, there is no distinction between legal and equitable set-offs where these principles are enforcible. *Ibid.*

7. *Equity—Set-Offs.*—A set-off is in the nature of a payment or credit when there are mutual debts existing between the parties. *Ibid.*

8. *Same—Mortgages.*—In the case of set-offs, the payment of a debt thereby applies equally to a debt secured by mortgage and to unsecured debts in proper instances. *Ibid.*

9. *Same—Title—Actions—Suits.*—The plaintiff was the purchaser of lands subject to mortgage, and also the owner of an unsecured note of the mortgagor, who after the plaintiff had demanded his right to set-off, transferred the note for value after maturity and the plaintiff, sought to enjoin the foreclosure sale of the mortgaged premises: *Held*, the defendant was a purchaser of the mortgage note with notice after demand, and the plaintiff was entitled to the set-off and thus to clear the title to the *locus in quo*. *Ibid.*

10. *Equity—Estoppel—Wills—Devise—Heirs at Law.*—A devise of the entire real and personal estate to the testator's wife and by a later item certain parts thereof to his two sons to see that their mother "don't suffer their care," etc.: *Held*, a division of the lands by the heirs at law subject to the terms of the will, and their consent in

EQUITY—*Continued.*

relation thereto is an equitable estoppel *in pais* against their claim that their mother acquired a fee-simple title, and that they could claim as her heirs at law, after her death, intestate. *Cook v. Sink*, 620.

ESCAPE. See Criminal Law, 2.

ESTATES. See Wills, 2; Injunction, 5; Dower, 5.

1. *Estates—Deeds and Conveyances—Condition Subsequent.*—Conditions subsequent that may defeat the title to lands granted are not favored by the law, and will be strictly construed to effectuate the intention of the parties as therein expressed, and ordinarily require a defeasance clause or one of reëntry upon the breach of the condition. *Hall v. Quinn*, 326.

2. *Same—Religious and Charitable Purposes.*—Where land is granted to trustees to hold for a religious denomination in trust for the purposes of a school, it will not be declared a condition subsequent, the breach of which will divest the title without other words that will by proper construction evidence the intention of the parties that it would be so regarded. *Ibid.*

3. *Same—Mortgages.*—Where lands are conveyed to the trustees of a religious denomination to be held for school purposes, without other indication that this was a condition subsequent, the trustees or other successors having the authority to do so, may execute a valid mortgage on the lands. *Ibid.*

4. *Estates—Wills—Trusts—Contingent Interests—Vested Rights—Executors and Administrators.*—A devise of an estate in trust for the testator's son and wife for life and to the testator's grandchildren of the marriage until the youngest child becomes 21 years of age, with certain contingent limitations over to their children, but in the event of the death of such grandchild or grandchildren in the lifetime of their parents, the others surviving should take their interest: *Held*, the testator's grandchildren acquired a vested interest in the estate at the time of the testator's death, the future enjoyment of the possession of which was fixed at the coming of age of the youngest child; and the trustee could convey a fee-simple title. *Baggett v. Smith*, 354.

5. *Estates — Forfeiture — Conditions Subsequent — Deeds and Conveyances.*—A deed to lands with a condition subsequent that may work a forfeiture and reëntry must contain sufficient words, such as "provide," "so as," "on condition" or other like expressions, to so declare the intent of the grantor therein, except in instances where the law, from the nature of the subject-matter, or the contemplation of the parties, implies a condition with forfeiture and reëntry which interpretation is not favored by law. *Shields v. Harris*, 520.

6. *Estates—Contingent Remainders—Statutes—Sales—Deeds and Conveyances—Interpretation.*—Where lands affected by a contingent interest contained in a deed are decreed to be sold by the court under the provisions of our statute, and the proceeds invested in accordance with the deed, and in furtherance thereof the commissioner who sells the land expressly stated in his deed that the contingencies of the

ESTATES—*Continued.*

original deed are to be preserved, but contains provisions at slight variation as to the meaning of certain of its terms: *Held*, it was sufficient under the pleading and evidence in this case for the court to reform the commissioner's deed; and, *held further*, these variations will be construed as a mistake of the draftsman, and the limitations construed as expressed in the original deed will control. *Robertson v. Robertson*, 558.

7. *Same—Equity—Reformation of Deeds — Words and Phrases — Vested Interests—Fee-Simple Title.*—A deed declaring a trust with certain contingent limitations over to the living children upon the death of their "father or mother," prior takers of the land: *Held*, construing the instrument to effectuate the intent of the grantor and the early vesting of the estate, the word "or" will be construed in its disjunctive sense, and the surviving children at the death of either parent will take a vested fee-simple estate. *Ibid.*

8. *Same—"Or" to mean "And."*—In construing a deed the word "or" will not be construed to mean "and" unless it is necessary to carry out the expressed intent of the grantor, or such intent is gathered from a correct interpretation of the instrument. *Ibid.*

9. *Estates—Wills—Devise—Conditions Subsequent.*—A devise of land to the testator's son and daughter "if either of them fail to see that their mother don't suffer their care, if either of them fail to take care of her their part to go to someone who will care for her, for them, their bodily heirs, if any, if none to next of kin": *Held*, the testator's named children, did not take an estate upon condition subsequent, but acquired their designated portion subject to a charge thereon for the support of their mother. *Cook v. Sink*, 620.

10. *Same—Wills—Intent—Forfeiture — Reëntry.* — In order to create an estate upon condition subsequent by will that will work a forfeiture upon condition broken, the intent of the testator must clearly appear from the construction of the will, reasonably employing words that create a forfeiture or rights of reëntry. *Ibid.*

11. *Estates—Conditions Subsequent—Covenants—Damages—Liens—Wills—Devise.*—A devise to the testator's son and daughter upon condition that they care for their mother, etc., will be construed to avoid a forfeiture, and when they take under the terms of the will and breach the condition, they take as upon a covenant, for the breach of which damages to the extent of the support provided for will be awarded and declared a lien upon their respective lands. *Ibid.*

12. *Same—Recital—Estoppel.*—Where the son and daughter take lands under the will of their father charged with the support of their mother, and the mother lives with the daughter under an agreement that the son will contribute his share, and the son has conveyed his lands subject to this agreement: *Held*, the receipt by the daughter in full from the son's grantee for the latter's obligation, fairly given, over her signature, will preclude her from a further recovery and by this and other of her acts in this case she is estopped to claim damages from her brother in breach of his implied covenant. *Ibid.*

13. *Estates—Remainders—Conditional Fee.*—Under a devise of an estate in remainder to be divided between testator's son and daughters,

ESTATES—*Continued.*

upon condition that they have bodily heirs, and should any of them die without such heirs, then to the others, etc., the son, after the falling in of the life estate, takes a fee defeasible upon his dying without such heirs. *Alexander v. Fleming*, 815.

14. *Same—Wills—Dower—Election—Statutes.*—Where a devisee takes a defeasible fee in lands, and dies intestate without the conditions performed, his widow can acquire no right of dower in the lands thus devised to him, and therefore she is not put to her election to take either under the will or under the law, C. S., 4100. *Ibid.*

15. *Estates—Wills—Deeds and Conveyances—Remainders.* A conveyance of lands by the life tenant and the remainderman, whether the latter takes as sole heir at law of the testator, or by vested or contingent remainder, under the will of his father, conveys to the grantee the life estate and the interest of the remainderman therein, whether it be the fee simple, or otherwise. *Brown v. Guthery*, 822.

16. *Estates—Reversion.*—A reversion is the residue of an estate left by operation of law in the grantor or his heirs at law, or in the heirs of the testator, if created by will, commencing in possession on the determination of the particular estate granted or devised. *Ibid.*

17. *Estates—Remainder—Reversion—Wills — Devise — Deeds and Conveyances.*—In order to construe the words of a grantor in a deed or the testator in a will as creating an estate by reversion or remainder, the intent of the parties as gathered from the instrument prevails, and the improper use of the one or the other of these words is not controlling. *Ibid.*

18. *Same—Title.*—A devise of an estate to the testator's wife for life, and upon her death to revert to his son "if he be alive, or to his heirs if he be dead," is held to pass to the son a remainder contingent upon his surviving his mother, and a conveyance made by the wife and son passes her life estate in the lands to the grantee, and a contingent interest of the son in remainder, and not the indefeasible fee-simple title in the lands conveyed. *Ibid.*

19. *Estates—Contingent Remainders—Vested Interests.*—Remainders are vested when the estate is invariably fixed to remain in a determinate person after the particular estate is spent, and contingent when limited to take effect on an event or condition which may never happen or be performed, or which may not happen or be performed until after the determination of the preceding particular estate. *Ibid.*

20. *Estates—Contingent Remainders—Rule in Shelley's Case.*—A devise to the testator's wife for life, remainder to his son "if he be alive or to his heirs if he be dead": *Held*, if the remainderman is survived by the life tenant, the estate may go to his heirs, who take as remaindermen in fee, and not by descent, and the rule in *Shelley's case* does not apply. *Ibid.*

ESTOPPEL. See Evidence, 3; Judgments, 7; Equity, 10; Estates, 12 Taxation, 5.

EVIDENCE. See Insane Persons, 2; Corporation Commission, 1; Electricity, 1; Injunction, 1, 2; Trusts, 5; Instructions, 1; 2, 10, 11, 15; Corporations 1, 2; Nuisance, 1; Appeal and Error, 1, 10, 18, 19; Contracts,

EVIDENCE—*Continued.*

2, 4, 25, 29, 31, 45; Ejectment, 1; Negligence, 1, 3, 6, 8, 12, 21, 24, 25; Bills and Notes, 1; Deeds and Conveyances, 6, 12, 23; Pleadings, 2; Bailment, 4; Equity, 1; Intoxicating Liquor, 1, 3, 5; Employer and Employee, 6, 8, 15, 23; Wills, 9, 10, 12; Limitation of Actions, 1; Taxation, 2; Banks and Banking, 6; Criminal Law, 7, 8; Carriers, 1, 6; Issues, 2; Judgments, 8; Actions, 10; Executors and Administrators, 3; Fires, 1; Homicide, 1, 3; Reference, 2, 5.

1. *Evidence—Motions—Nonsuit—Questions for Jury — Ponding Water — Electricity.*—In an action for damages to the health of plaintiff and his family alleged to have been caused by malaria carried by the bites of certain kinds of mosquitoes, there was expert medical evidence tending to show, and *per contra*, that the proximate cause of plaintiff's damage was the breeding of these mosquitoes by the intermittent lowering of the water level above and below the ponding of a dam used by defendant in generating electricity, from stagnant pools of water among trees and undergrowth negligently left by the defendants growing upon the watershed: *Held*, upon defendant's motion to nonsuit, sufficient to take the case to the jury upon the issue of defendant's actionable negligence. *Godfrey v. Power Co.*, 24.

2. *Same—Experts—Opinion Evidence—Issues.*—*Held*, the expert evidence in this case supplemented the common knowledge of the jury and nonexpert testimony, and was a material and additional aid to the jury in determining the issue of defendant's actionable negligence, and was not objectionable as involving the question of negligence which alone it was the jury's province to determine. *Ibid.*

3. *Same—Leases—Estoppel—Appeal and Error.*—Under the evidence of this case: *Held*, a lease by the defendant to the plaintiff of an unused portion of the land on the watershed of the stream for the supply of water to a ponded expanse used by the defendant in generating electricity to be sold to the public, by its terms was not intended to exclude the plaintiff from recovering damages for impaired health caused by the manner in which the water was ponded. *Ibid.*

4. *Evidence—Ponding Water—Appeal and Error.*—In an action to recover damages for injury to health alleged to have been caused by ponding water for generating electrical power: *Held*, evidence for defendant that there was no general epidemic at the time, or at another pond some distance off, is properly excluded. *Ibid.*

5. *Same—Rebuttal Evidence.*—It was competent for the plaintiff to offer evidence in rebuttal of defendant's evidence tending to show that the malaria-bearing mosquitoes were found outside a greater area than covered by the *locus in quo* upon the question as to whether the plaintiff and his family were caused to have malaria as a result of the defendant's ponding water for the generating of electricity under the circumstances of this case. *Ibid.*

6. *Evidence—Photographs.*—Witnesses may use photographs for the purpose of explaining their testimony relevant to the inquiry, under proper safeguard confining the photographs to this purpose alone, though they are not introduced in the case as substantive evidence. *Elliott v. Power Co.*, 62.

EVIDENCE—*Continued.*

7. *Evidence—Health—Opinions of Supreme Court—Appeal and Error—Harmless Error.*—In an action to recover damages to plaintiff's health by defendant's ponding water near his dwelling, caused by the bites of mosquitoes bred by the waters ponded, it is improper for an opinion of the Supreme Court on the subject to be read to the jury, either by court or counsel, for the purpose of establishing a fact or theory, but the party who contends that the theory thus read is a correct one cannot successfully complain on appeal. *Ibid.*

8. *Evidence—Deceased Persons—Statutes.*—C. S., 1795, prohibiting a witness from testifying to transactions and communications with a deceased person under whom the witness claimed title to lands in dispute in the action, does not exclude the testimony of the witness to a conversation between the deceased person and another, who was alive at the time. *Abernathy v. Skidmore*, 66.

9. *Evidence—Contracts—Futures—Appeal and Error.*—Testimony of a witness as to what facts constitute a marginal payment under the terms of a contract in violation of our statute is unobjectionable when correctly stating the law. *Welles & Co. v. Satterfield*, 89.

10. *Evidence—Criminal Law—Courts—Appeal and Error.*—Where upon the trial of a criminal action a witness is permitted to testify to the admissions made to him by one of several defendants as to his guilt, and the witness states the names of others participating in the offense charged, it is within the power and duty of the trial judge to exclude the evidence as to the other defendants upon trial, by such remarks as to make it nonprejudicial as to them, and where he has sufficiently done so, it may not be held for error on appeal. *S. v. Griffin*, 133.

11. *Evidence—Discovery—Pleadings—Statutes.*—To obtain an order for the examination of defendant to discover necessary information to file his complaint under the provisions of C. S., 900 *et seq.*, it is necessary for the plaintiff to show under oath that in good faith the information sought is not otherwise available to him, and its necessity in such detail as will enable the court to pass thereon, and when an appeal from the refusal of the order, this has not been done, the decision of the lower court will not be disturbed. *Chesson v. Bank*, 187.

12. *Evidence—Nonsuit.*—In an action upon the promise of another to pay for lumber used in the construction of a dwelling, to the extent of a certain amount loaned to the owner, upon the latter's approving the various accounts which alone the evidence tends to show, a judgment of nonsuit in plaintiff's favor should be allowed when the amount involved exceeds that agreed upon as a loan, and the owner has for that reason refused to approve it. *Lumber Co. v. Higgs*, 195.

13. *Evidence—Prima Facie Case—Issues—Burden of Proof—Questions for Jury.*—Where the evidence is sufficient to make out a prima facie case of negligence on the part of the defendant bailee of goods, the burden of proof of the issue remains with the plaintiff, the prima facie case being only sufficient to sustain a verdict in his favor if the jury should render such a verdict upon competent evidence. *Morgan v. Bank*, 210.

14. *Evidence—Nonsuit.*—Upon defendant's motion as of nonsuit, the evidence is to be considered in the light most favorable to the plaintiff. *Wimberly v. R. R.*, 444.

EVIDENCE—*Continued.*

15. *Evidence—Conflicting Evidence of Plaintiff—Nonsuit.*—The defendant's motion as of nonsuit will be denied, though from a part of the plaintiff's evidence no cause of action has been shown, if other of his evidence is sufficient to sustain his cause. *Ibid.*

16. *Evidence—Motions—Nonsuit.*—In defendant's motion to nonsuit upon the evidence, the evidence must be taken in the light most favorable to plaintiff, and he is entitled to the benefit of every reasonable inference or intendment thereon. *Fleming v. Holleman*, 449.

17. *Evidence—Personal Injury—Exhibiting Injury—Experts — Consent — Damages—Appeal and Error—Issues.*—Where the plaintiff in an action to recover damages for a personal injury goes upon the stand and exhibits or exposes the injured place to the jury, the defendant, as a matter of right, may have it subjected to an expert or medical investigation upon the issue as to the amount of damages recoverable, and the action of the court requiring the consent of the plaintiff thereto is reversible error, entitling the defendant to a new trial and only upon that issue when alone involved in the error. *Ibid.*

18. *Evidence—Instructions—Directing Verdict.*—Where the evidence and all legal inferences therefrom are unequivocal and in favor of one party to an action, an instruction directing a verdict in his favor is not erroneous. *Trust Co. v. Trust Co.*, 468.

19. *Evidence—Prima Facie Case—Burden of Proof—Instructions—Appeal and Error.*—Where the plaintiff's evidence makes out a prima facie case, it is only sufficient to take the case to the jury to determine the issue, and for them to sustain a verdict thereon in the plaintiff's favor, and an instruction that it shifts the burden of proof to the defendant, is reversible error. *McDaniel v. R. R.*, 474.

20. *Evidence—Witnesses—Opinions.*—While a witness may testify to facts within his knowledge, he may also testify under the more modern rules to such as by reason of his personal observation he is in a position to know more accurately than the jury, who have not had such opportunity. *S. v. Brodie*, 554.

21. *Evidence—Character—Admissions—Appeal and Error.*—As to the character of the defendant criminally charged with setting fire to his insured stock of merchandise, testimony of a witness that he had previously heard of defendant's setting fire to his stock at other places, etc., will not be considered as prejudicial to defendant when he afterwards admits it as a witness in his own defense. *Ibid.*

22. *Evidence—Opinion.*—The evidence of witnesses who have had observation of certain conditions relevant and material to the inquiry involved in the action, is more broadly received now than heretofore, upon the ground that it is more enlightening to the jury who could not have had this opportunity, and aids them in their conclusion. *Greensboro v. Garrison*, 577.

23. *Same—Municipal Corporations—Cities and Towns—Condemnation — Damages.*—Upon the measure of damages to be paid to the owner for the taking of his land for a ditch to be used by a city in connection with its public works, it is competent for a witness to state that before the final completion of the ditch, he had observed

EVIDENCE—*Continued.*

the property, and to give his estimate of the difference in value of the owner's land just before and after the time of its appropriation. *Ibid.*

24. *Same—Appeal and Error—Harmless Error.*—Upon the question of the measure of damages to be paid to the private owner of land for its taking by a city for public use, it is harmless error to the city to reject its testimony tending to show the owner's idea of his damages in a conversation with an employee of the city, authorized by it as its agent in this matter, when the other evidence in the case sufficiently covers the evidence sought to be elicited. *Ibid.*

25. *Evidence—Nonsuit.*—On a motion to nonsuit upon the evidence by defendant, the evidence will be considered in the light most favorable to the plaintiff. *Dunbar v. Tobacco Growers*, 608.

26. *Evidence—Contracts—Breach—Experience.*—In an action by a contractor to recover the balance of the contract price for supervising and conducting the erection of a building, where the defendant pleads and offers evidence to show a breach thereof by plaintiff, defendant's evidence as to his experience is competent as to his skill and intelligence to perform his contract, as corroborative evidence of his denial of negligence and incompetence, though incompetent as to good character upon a charge of fraud, or as a defense in wrongful arrest. *Moss v. Knitting Mills*, 644.

27. *Same—Appeal and Error.*—Where evidence is competent in part, a broadside exception will not be sustained on appeal. *Ibid.*

28. *Evidence—Cross-Examination.*—The right of a party to cross-examine witness upon the trial, is among other things, to afford him protection against the conclusion of a witness which he has stated as a fact. *Ibid.*

29. *Evidence—Motion to Dismiss—Nonsuit.*—Defendant's motion to dismiss in a criminal action for insufficient evidence to convict, will be denied if there is any phase thereof which tends to prove his guilt. *S. v. Trott*, 674.

30. *Evidence—Statutes—Nonsuit—Motions.*—Under the provisions of C. S., 4643, the defendant in a criminal action may have the case dismissed upon the insufficiency of the evidence, as in a civil action, C. S., 567, upon motion at the close of the State's evidence, or upon the whole evidence. *S. v. Sigmon*, 684.

31. *Same—Criminal Law—Burden of Proof.*—A motion to dismiss or as of nonsuit upon the evidence in a criminal case, will be denied if sufficient, considered in the light most favorable to the State, to prove guilt of the defendant beyond a reasonable doubt. *Ibid.*

32. *Same—Reasonable Doubt.*—The requirement that the evidence must be sufficient to convict beyond a reasonable doubt in criminal actions, is for the benefit of the defendant; and it requires the State to satisfy a jury to a moral certainty of the truth of the charge. *Ibid.*

33. *Evidence—Intoxicating Liquor—Spirituous Liquor—Smell.* — Evidence by the smell in the rear of the car with other circumstances that an

EVIDENCE—*Continued.*

automobile had contained whiskey, having jugs, funnel, etc., as in this case: *Held*, sufficient to sustain a verdict of unlawfully transporting intoxicating liquor. *Ibid.*

34. *Same—Statutes—Per Cent of Alcohol.*—Where the evidence is sufficient to convict the defendant of unlawfully transporting whiskey, it is presumed that when whiskey is spoken of that it contained more alcohol than one-half of one per centum, prohibited by the statute. *Ibid.*

35. *Evidence—Witnesses — Cross-Examination.* — One of the purposes of cross-examining a witness is to render more definite and certain his testimony, and to expose any bias or uncertainty the witness may have with regard to his statements made on his direct examination, so that the evidence will be more valuable to the jury in determining the facts at issue. *Milling Co. v. Highway Commission*, 692.

36. *Same—Rights of Party.*—The opposing party has a right to cross-examine the witnesses testifying against him, and such is not a mere privilege. *Ibid.*

37. *Evidence—Nonsuit.*—Upon a motion as of nonsuit, the evidence is construed in the light most favorable to the plaintiff; and, *Held* sufficient, in this case, to hold the father, the owner of an automobile, liable for the negligence of his son in driving the car with the implied authority of the father proximately causing a personal injury to another. *Watts v. Lefler*, 722.

38. *Evidence—Nonsuit.*—Upon a motion for judgment as of nonsuit upon the evidence, the evidence is to be taken in the view most favorable to the plaintiff. *Bradford v. English*, 743.

39. *Evidence—Banks and Banking—Books—Entries—Canceled Checks — Hearsay.*—Where the purchaser of a truck claims title by payment by canceled check on a local bank, and thus raises this issue, it is competent for the cashier of a bank of which the payee bank was a branch, and who had supervision and control thereof to testify that a check of the amount claimed at the time of the transaction in controversy, was paid by the local bank in confirmation of the plaintiff's evidence as appeared from the book of record of the local bank, and to offer the same in evidence; and this evidence was not objectionable as hearsay on account of the witness not having personally handled the said check or made the record thereof. *Flowers v. Spears*, 747.

40. *Evidence—Instructions—Bias—Interest—Appeal and Error—Requests for Special Instructions—Objections and Exceptions.*—Where the trial judge charges the jury in a criminal action to scrutinize the evidence of the defendant and that of all his close relations who have testified in his behalf upon the trial, before accepting it as true, in the absence of the refusal of a special request to that effect, it is not reversible error for him to have failed to extend the caution to other interested witnesses, such matters being a subordinate and not a substantive feature of the trial. *S. v. Sauls*, 810.

41. *Evidence—Conjecture—Pleadings.*—In order to recover damages for negligently resulting in the death of another, it is required not only that the complaint sufficiently alleges the negligence complained of,

EVIDENCE—*Continued.*

but that the evidence thereof on the trial raises more than a mere conjecture or possibility of the existence of the necessary fact in issue. *Pangle v. Appalachian Hall*, 833.

EXCESS PAYMENT. See Principal and Agent, 3.

EXCUSABLE NEGLECT. See Judgments, 5, 9.

EXECUTION. See Sheriffs, 1.

EXECUTORS AND ADMINISTRATORS. See Estates, 4; Wills, 3.

1. *Executors and Administrators—Debts—Personal Liability.*—An executor cannot charge the estate of the decedent with obligations arising after his death, incurred in the continuance of a business the decedent had engaged in during his life, such liability being that of the executor personally who has attempted to do so. *Snipes v. Monds*, 190.

2. *Executors and Administrators—Trusts—Good Faith—Ordinary Care—Insurer—Officers.*—An executor or administrator is not held to be an insurer in executing the trust arising from such position, but only to act in good faith, with due diligence and ordinary care, in accordance with the responsibility of his office. *Marshall v. Kemp*, 491.

3. *Same—Evidence—Directing Verdict—Appeal and Error—New Trials.*—Where an administration of the estate of the decedent is contested upon the ground that invalid letters had been issued to him by the clerk of the Superior Court of the wrong county, and it has been determined against him acting in good faith on appeal to the judge of the Superior Court, and by the Supreme Court on further appeal, an instruction that fixes the liability of the administrator and his bondsmen if this evidence is accepted by the jury, for a deposit he had made in a bank that had since become insolvent, is reversible error, it being for them to determine further as to whether he had acted in good faith and the care required in such instances. *Ibid.*

EXEMPTION. See Homestead, 2.

EXONERATION. See Bills and Notes, 5.

EXPERTS. See Evidence, 2, 17.

EXPRESS COMPANIES. See Carriers, 4.

EXTENSION NOTES. See Contracts, 37; Insurance, 3.

FALSE ARREST. See Employer and Employee, 12.

FEDERAL CONTROL. See Telegraphs, 1.

FEDERAL EMPLOYERS' LIABILITY ACT. See Employer and Employee, 15.

FEDERAL STATUTES. See Employer and Employee, 14; Removal of Causes, 3.

FEES. See Principal and Agent, 2.

FEE SIMPLE. See Estates, 7.

FERTILIZER. See Pleadings, 3.

FILING REPORT. See Reference, 4.

FINDINGS. See Injunction, 1; Appeal and Error, 5, 11, 27, 38; Judgments, 6; Reference, 5.

FINES. See Municipal Corporations, 17.

FIRES. See Negligence, 6.

1. *Fires—Evidence—Criminal Law—Inventories.*—Upon the trial for unlawfully setting fire to his stock of merchandise purchased a few months prior to the occurrence, the former owner, who had made an inventory for the purpose of sale, may testify as to the value of the stock of merchandise at the time of the fire, when he has during the interval observed the merchandise in view of its depletion or replenishment, when relevant to the inquiry. *S. v. Brodie*, 554.

2. *Same—Corroboration.*—On trial for the setting fire to his stock of merchandise, which necessarily destroyed the stock of merchandise of another, testimony of such other person that the witness had been previously warned to take out insurance beforehand by the defendant is competent, and that of the wife in corroboration of what her husband told her, is also competent. *Ibid.*

3. *Same—Insurance—Motive.*—Upon the question of the motive of the defendant for setting fire to his stock of merchandise on trial under a criminal indictment, that he had padded his inventory for the purpose of over-insurance, it is competent to show the inventory upon which he had bought it some few months before, with the other evidence in this case as to its value at the time of the fire. *Ibid.*

FOREIGN CORPORATIONS. See Comity, 1.

FORFEITURE. See Estates, 5, 10.

FRANCHISE. See Corporation Commission, 1.

FRAUD. See Deeds and Conveyances, 4, 11; Contracts, 4, 25, 26, 27, 41; Pleadings, 4; Constitutional Law, 6, 7; Actions, 4; Bills and Notes, 7; Gaming, 1; Guardian and Ward, 1.

FREIGHT. See Carriers, 1.

FUTURES. See Contracts, 1; Evidence, 9; Telegraphs, 5.

GAMING.

1. *Gaming—Newspaper Circulation Contest—Fraud—In Pari Dilicto—Contracts.*—Where the agent of the defendant in a newspaper circulation contest has wrongfully induced the plaintiff to pay to him her own money for sending the newspapers to others, and she sues upon the agent's fraud and deceit, recovery may be had upon the grounds alleged, and the position of the defendant that the transaction was against good conscience and public morals, and that no recovery could be had because plaintiff was *in pari dilicto*, is unavailable. *Waggoner v. Publishing Co.*, 829.

GIFTS. See Deeds and Conveyances, 9; Contracts, 24.

GOOD FAITH. See Executors and Administrators, 2.

GOVERNMENT. See Counties, 2; Roads and Highways, 1.

1. *Government—Taxes—Liens—Statutes—Limitation of Actions.*—Where a county proceeds to foreclose a tax lien under the provisions of C. S., 7990, as distinguished from an action to foreclose the tax-sale certificate, instead of under those of C. S., 8037, which it may elect to do, it proceeds as a part of the state sovereignty, and there is no bar of the statute of limitations, that of C. S., 8037 not applying. *New Hanover v. Whiteman*, 332.

2. *Same—Judgments.*—Where a county brings suit to foreclose a tax lien on the lands of the taxpayer and draws its complaint according to the provisions of C. S., 7990, other taxes due after the commencement of the action are properly included in the judgment therein rendered in its favor. *Ibid.*

3. *Government—Municipal Corporations.*—Incorporated cities and towns within the powers given them are local governmental agencies of the State, and in the absence of statutory provision to the contrary, may not be sued for damages for the negligence of their agents and employees while discharging governmental functions. *Mabe v. Winston-Salem*, 486.

4. *Same—Torts—Negligence—Principal and Agent — Waterworks — Statutes.*—A municipality is in the exercise of its governmental powers in maintaining a fire department, and an action for damages for failure to sooner extinguish a fire on the property of the owner thereof by reason of having permitted its street at the fire hydrant there to become obstructed and remain so, is not maintainable without statutory provision making them so, their exemption as to furnishing a sufficient supply of water, etc., being expressly stated in the statute. C. S., 2807. *Gorrell v. Water Co.*, 128 N. C., 375, and like cases, distinguished by Stacy, C. J. *Ibid.*

5. *Same—Proximate Cause.*—Where in an action against a city to recover damages for a fire loss alleged to have been caused by permitting obstructions to remain at its fire hydrants, the proximate cause is the failure of the city to put out the fire for which no recovery may be had, under C. S., 2807. *Ibid.*

6. *Government—Highways—State Highway Commission.*—The State Highway Commission is a governmental agency of the State, while acting within the powers and duties prescribed in the act creating it. *Trust Co. v. Highway Commission*, 680.

7. *Same—Venue—Statutes.*—An action against the State Highway Commission and a surety on the contractor's bond given for payment of laborers, etc., upon a State highway construction, prior to 10 March, 1925, is properly brought in the county within this State in which the plaintiff resides, and may not be removed as a matter of right therefrom to the court of the county in which the work was done. C. S., 2445, not applying in such cases. *Ibid.*

8. *Same—Prospective Statutes.*—An action against the State Highway Commission and surety on contractor's bond given for the benefit of those performing labor or work upon a State highway since 10 March, 1925, is governed as to venue by ch. 260, Public Laws of 1925, which is prospective in effect. *Ibid.*

GUARANTOR. See Banks and Banking, 1; Bills and Notes, 6; Equity, 4.

GUARDIAN AND WARD.

1. *Guardian and Ward—Leases—Landlord and Tenant — Fraud — False Warranty—Damages—Statutes.*—Where a lease by the guardian of his ward's lands was not publicly made, C. S., 2171, nor approved by the clerk of the Superior Court, C. S., 2172, the lessee may not hold the ward's estate liable for the false representations of the guardian's agent as to the value of the leased property for the lessee's purposes, nor for his false warranty thereof. The personal liability of the one acting as guardian remarked upon by STACY, C. J. *Coxe v. Sales Co.*, 838.

HARMLESS ERROR. See Evidence, 7, 24; Appeal and Error, 2, 10, 12, 19, 37.

HEALTH. See Evidence, 7; Insurance, 2.

1. *Health—Municipal Corporations—Cities and Towns—Cows—Statutes—Police Powers—Constitutional Law — Discrimination.* — A municipal corporation is given authority to regulate the keeping of cows within its limits as pertaining to the health of its citizens and within its police powers, and in the reasonable exercise of such powers may prescribe and define a certain area therein wherein cows may not be kept, without violating the organic law against discrimination. C. S., 2787. *S. v. Stowe*, 79.

2. *Same—Courts.*—An ordinance to preserve the health of its citizens is largely left to the determination of the municipal authorities, and will not be interfered with by the courts unless it is made manifestly to appear that it is unreasonable and oppressive. *Ibid.*

HEARINGS. See Municipal Corporations, 3; Reference, 1.

HEARSAY. See Evidence, 39.

HEIRS. See Deeds and Conveyances, 4; Wills, 5; Descent and Distribution, 1; Equity, 10.

HIGHWAYS. See Government, 6.

1. *Highways—Condemnation—Damages—Loss of Profits.*—The owner of a water mill acquiring rights of ingress and egress for his customers upon the lands of others and the construction of a bridge and maintenance of a ferry situated to command a large patronage for his mill, brought an action against the State Highway Commission for damages to these right of ways by the building of a State highway and bridge, and alleged his land on which the mill was operated became greatly less profitable and sought to recover damages for the taking of his property: *Held*, damages to his property and property rights were the sole ground of his recovery of damages, and loss of profits to his mill was speculative and too remote. *Milling Co. v. Highway Commission*, 693.

HOMESTEAD.

1. *Homestead—Judgments—Liens—Statutes.*—The allotment of a homestead suspends the enforcement of all judgments during the continuance of the homestead interests. C. S., 728. *Barnes v. Cherry*, 772.

2. *Same — Duration of Exemption — Widow — Children — Constitutional Law.*—Where the owner of a homestead against which there are judgment liens dies leaving surviving a widow and minor children,

HOMESTEAD—*Continued.*

the widow is not entitled, as against such liens, to a homestead in the lands of her deceased husband during the life of the child or children by the marriage, whether minors or adults, but if there are no children, the lands shall be exempt from execution during the lifetime of the widow. Const., of N. C., Art. X, secs. 3 and 5. *Ibid.*

3. *Same—Minor Children—Majority.*—Where there are judgment liens against a deceased owner of lands leaving surviving a widow and children, a homestead therein laid off is exempt until the youngest child reaches the age of twenty-one, at which time the homestead right falls in, and not at the prior time of the death of the widow. *Ibid.*

HOMICIDE. See Criminal Law, 7.

1. *Homicide—Murder—Evidence—Corroboration.*—Where there is evidence that the defendant on trial for the homicide and the wife of the deceased bore illicit relations to each other, it is competent for the purpose of corroboration for the sheriff to testify to a statement made by him to the wife of defendant soon after the homicide and acquiesced in, "You have been with the defendant four weeks, five different Sundays, and you ought to have been with your husband," on the question of motive of the defendant in committing the act. *S. v. Steele*, 506.

2. *Same—Appeal and Error—Objections and Exceptions.*—Where upon the admission of evidence the court states upon the trial that it is for the purpose of corroboration only, it is not error for him to omit to so state in his instructions to the jury, in the absence of a special request thereto by the defendant. *Ibid.*

3. *Homicide—Evidence—Motive—Appeal and Error—Objections and Exceptions.*—Where the evidence tends to show the illicit relations of of the prisoner and the wife of deceased, and there is plenary evidence of his having committed the homicide, it is competent for the solicitor to argue this to the jury upon the question of motive, and for the court to include it in his statement of the State's contentions thereon. *Ibid.*

4. *Homicide—Murder — Premeditation.* — The premeditation required to sustain a conviction of murder in the first degree, is that it must have been before the killing, in cold blood, for however short a time in furtherance of a fixed design to gratify a feeling of revenge or to accomplish some unlawful purpose, and not under the influence of a violent passion, suddenly aroused by some lawful or just cause or legal provocation, and subsequent acts may also afford evidence of the defendant's guilt, but flight is not evidence of premeditation and deliberation. *Ibid.*

5. *Homicide—Murder—Drunkenness—Criminal Law.*—Voluntary drunkenness which produces irresponsibility will not ordinarily excuse liability for a criminal offense committed under the influence of intoxication thus produced. *S. v. Trott*, 674.

6. *Same—Automobiles—Collisions—Negligence.*—Where one in charge and control of an automobile becomes drunk, and before losing his senses puts another in charge of the car to operate it, and remains in the automobile on the back seat and becomes mentally incapacitated, and the one operating the car had likewise been drinking with the defendant, and by his reckless driving in violation of our statute,

HOMICIDE—*Continued.*

runs into another automobile and causes the death of a person for whose death the defendant is on trial for murder in the second degree or manslaughter, a prayer that there is no evidence of murder in the second degree will be denied. *Ibid.*

7. *Same—Malice.*—The malice necessary for a conviction of murder in the second degree, may be inferred or implied from a reckless or wanton act which imports danger to another, evidencing mental depravity and disregard of human life. *Ibid.*

8. *Same—Intent.*—The intent to kill may be presumed from the facts and circumstances attending the taking of a human life, with which the defendant is charged. *Ibid.*

HOSPITALS. See Insane Persons, 1, 3.

HUSBAND AND WIFE. See Trusts, 3.

1. *Husband and Wife—Survivorship—Lands.*—The right of survivorship existing between husband and wife applies only to real property. *Smith v. Smith*, 765.

INDICTMENT. See Criminal Law, 3.

1. *Indictment—Probable Cause—Criminal Law.*—An indictment for embezzlement in the Superior Court is prima facie probable cause for its prosecution. *Kelly v. Shoe Co.*, 406.

2. *Indictment—Sufficiency — Statutes — Criminal Law.* — Under the provisions of C. S., 4623, an indictment will not be quashed for insufficiency in charging the offense if in plain, intelligible and explicit manner, sufficient matter appears to enable the court to proceed to judgment. *S. v. Sauls*, 810.

3. *Same—Incest—Motion to Quash.*—Where an indictment charges that a father did feloniously and incestuously have intercourse with his daughter, and is otherwise sufficient, the mere fact that it failed to charge "carnal" knowledge, is not a fatal defect that would sustain the defendant's motion to quash the indictment. *Ibid.*

4. *Same—Common Law.*—Incest was not indictable at common law, and being made a felony by statute, C. S., 4337, 4338, the indictment must charge the crime substantially within the terms of the statute. *Ibid.*

INJUNCTION.

1. *Injunction—Trespass—Sewerage—Nuisance—Findings—Evidence—Appeal and Error.*—Upon motion to continue a restraining order to the hearing of the cause, it appeared on appeal from the judgment of the lower court and the judge's findings of fact that defendants operated cotton mills on their lands adjoining those of the plaintiffs, employing a large number of operatives, maintained a septic tank on their own land for sewerage, which emptied with increased volume of water into a stream thereon and *was conveyed* thereby to plaintiffs' lands, to the damage of the health of plaintiff and his family residing thereon: *Held*, this conduct of defendants was a continuous trespass or nuisance on plaintiffs' rights and property, and there being conflicting evidence to support these findings, the restraining order was properly continued to the hearing. *Finger v. Spinning Co.*, 74.

INJUNCTION—*Continued.*

2. *Same—Appeal and Error—Evidence—Review.*—Upon appeal from an order continuing a restraining order to the final hearing involving the question of defendants committing a nuisance to the injury of the plaintiffs' health while residing on adjoining lands: *Held*, the evidence upon which the judge based his findings of fact is reviewable. *Ibid.*

3. *Same—Public Interests—Damages.*—The operation of a cotton mill for defendants' advantage or profit does not so affect the public interest as to permit them to maintain a nuisance to the injury of the health of the family of an adjoining owner, upon compensation in damages. *Ibid.*

4. *Injunction—Municipal Corporations—Cities and Towns—Streets—Bidding—Statutes.*—Injunctive relief against a municipality will be available to a citizen thereof and taxpayer therein, when in a suit in behalf of himself and others so situated, he alleges that the municipal authorities accepted a bid for street paving higher than that submitted by another responsible bidder, induced thereto by person favor. C. S., 2830. *Murphy v. Greensboro*, 269.

5. *Injunction—Equity—Deeds and Conveyances — Reverter — Estates.* — Where a deed to lands is given upon condition that it shall be forfeited and revert to the original owner if or when used for certain immoral or unlawful purposes, in a land development with other like grantees, a deed from the original owner removing these conditions releases the mere right of a bare possibility of reverter not assignable at common law, and is not subject to be enjoined in equity by those who have purchased the lands under deeds having similar provisions. *Sharpe v. R. R.*, 350.

ILLEGITIMATE CHILDREN. See Descent and Distribution, 2.

IMPROVEMENT. See Municipal Corporations, 1.

INCEST. See Indictment, 3.

INDEPENDENT CONTRACTOR. See Employer and Employee, 5.

INDEX. See Liens, 1.

INDICTMENT. See Criminal Law, 3, 5, 6.

INFERIOR COURTS. See Appeal and Error, 29.

INHERITANCE. See Taxation, 1.

INJUNCTION. See Appeal and Error, 11, 28; Removal of Causes, 1; Deeds and Conveyances, 22.

IN PARI DILICTO. See Gaming, 1.

IN PARI MATERIA. See Statutes, 2, 7.

INSANE PERSONS.

1. *Insane Persons—Hospitals—Negligence—Suicide—Damages.*—Where a privately owned hospital for the treatment of mental diseases for gain, receives a patient afflicted with melancholia, and inclined to self destruction, it is liable for the negligence of those in charge of the patient resulting in his suicide. *Pangle v. Appalachian Hall*, 833.

INSANE PERSONS—*Continued.*

2. *Same—Evidence—Declarations—Principal and Agent—Res Gestæ.*—A letter written by a physician formerly in charge of a patient at a private hospital for the insane to the plaintiff, as to the manner of the suicide of the patient, after the patient's suicide, that would be evidence of the negligence of the hospital, in respect thereto, is not a part of the *res gestæ*, and is properly excluded upon the trial. *Ibid.*

3. *Insane Persons—Private Hospitals—Treatment—Care Required—Negligence.*—Where a privately owned hospital for the treatment of insane persons receives a patient afflicted with melancholia, and having a tendency to self-destruction, its management implies: 1, that its physicians, nurses and attendants possess the requisite degree of learning, skill and ability necessary to the practice of their professions, and which others similarly situated ordinarily possess; 2, that they will exercise ordinary and reasonable care and diligence in the use of their skill and the application of their knowledge to the patient's case: 3, and that in the care thereof they will exercise their best judgment and ability. *Ibid.*

INSOLVENCY. See Corporations, 3; Partnership, 1.

INSTRUCTIONS. See Limitation of Actions, 1; Appeal and Error, 3, 8, 25, 35; Contracts, 2, 10, 45; Criminal Law, 1; Intoxicating Liquor, 2, 3; Pleadings, 8; Wills, 9, 10, 11; Banks and Banking, 6; Employer and Employee, 17, 24; Evidence, 18, 19, 40; Trusts, 5; Negligence, 16, 25; Bills and Notes, 7.

1. *Instructions—Pleadings—Evidence—Appeal and Error.*—Where in an action to recover damages for an injury negligently inflicted on plaintiff, there is allegation and evidence to sustain the action on the issue, the instruction of the court upon the law embraced by the controversy is an essential part of the verdict, and failure of the judge to charge thereon (C. S., 564) is reversible error, especially so when opposing counsel had argued the facts and the law as permitted them under the provisions of C. S., 203. *Nichols v. Fibre Co.*, 1.

2. *Instructions—Evidence.*—Where the entire evidence is in defendant's favor and admits of but one inference, it is correct for the trial judge to instruct the jury that if they believe the evidence to answer the issue in his favor. *Thomas v. Morris*, 244.

3. *Instructions—Disjunctive Parts—Appeal and Error.*—Upon exception to and appeal from the charge of the court, his instructions will not be regarded in disjunctive fragments, but construed with the other relative portions thereof. *Riggs v. Mfg. Co.*, 257.

4. *Instructions—Disagreement of Jury—Expression of Opinion—Statutes.*—Where the jury in a criminal action have for several days failed to agree, an instruction by the court that he presumed they realized the effect of a disagreement as to the cost to the county, etc., expressly stating he did not want to coerce them into an agreement, is not objectionable as expressing an opinion upon the evidence, or erroneous as against the provisions of our statute on the subject. *S. v. Brodie*, 554.

INSTRUCTIONS—*Continued.*

5. *Instructions—Appeal and Error—Requests.*—Where correct prayers for special instructions are offered in apt time upon the trial, it is only required that in the general charge they are sufficiently and substantially given by the trial judge. *Michaux v. Rubber Co.*, 617.

6. *Same—Issues.*—A requested instruction that does not fully in all material aspects cover the principles of law applicable to the relative evidence, is properly refused when in his general charge the correct principles applicable to each issue is separately and correctly given. *Ibid.*

7. *Same—Statutes—Expression of Opinion.*—An instruction is properly refused that would in part ignore conflicting evidence upon an issue involved in the trial. *Ibid.*

8. *Instructions—Construed as a Whole—Appeal and Error.*—An instruction in an action by the owner to recover damages for the taking of his lands for a public use by condemnation, is not held for reversible error, when from the charge as a whole in its connected parts, it appears that the court has fully instructed them upon the measure of damages in terms they could not reasonably have misunderstood. *Milling Co. v. Highway Commission*, 693.

9. *Instructions—Statutes—Incidental Matters—Special Requests—Appeal and Error.*—While the judge is required by C. S., 564, to instruct the jury as to the law arising on the evidence in the case, it is not error for him to omit to charge upon purely incidental matters, and his failure to do so in the absence of a special request for correct special instructions, is not reversible error. *Ibid.*

10. *Instructions—Evidence—Appeal and Error.*—An instruction that is not based on evidence permitted by the pleadings, is reversible error, when prejudicial to the appellant. *Dorsey v. Corbett*, 783.

11. *Instructions—Statutes—Evidence—Appeal and Error.*—Our statute, C. S., 564, requiring the trial judge to plainly and concisely state the evidence in the case, and declare and explain the law arising thereon, gives to the parties to the action a substantial right. The jury has the sole and exclusive function of finding the facts from the evidence under the law thus given them, and it is not their duty, in any event, to determine what is the law. *Wilson v. Wilson*, 819.

12. *Same—Damages.*—Where a breach of contract for services rendered is at issue, each party contending a breach thereof by the other, and asking for damages, it is required by C. S., 564, that the trial judge charge the jury upon the law in the case arising from the evidence upon the issue as to damages, as well as the other essential features of the case necessary to a correct verdict, and his failure to charge upon this issue, is reversible error. *Ibid.*

13. *Instructions—Contentions—Appeal and Error.*—It is not required by our statute, C. S., 564, or by law, that the judge give the contentions of the parties in his instructions to the jury. *Ibid.*

14. *Instructions—Pleadings.*—The pleadings are the basis for the evidence, and the law to be given in the charge to the jury. *Ibid.*

INSTRUCTIONS—*Continued.*

15. *Instructions—Evidence—Contentions—Statutes — New Trials.* — Under the provisions of our statute, C. S., 564, it is reversible error for the trial judge to fail to instruct the jury upon the law arising from the evidence in the case necessary to a correct finding of their verdict, and a mere summary of the contentions of the parties is insufficient. *Watson v. Tanning Co.*, 840.

16. *Instructions — Conflicting in Material Parts — New Trial.* — When a charge to the jury of the law arising from the evidence upon the trial is conflicting substantially, and upon material parts, the jury will not be presumed to have perceived the error and correctly have applied the law, and a new trial will be granted on appeal. *Young v. Comrs. of Yancey*, 845.

INSURANCE. See Comity, 2; Employer and Employee, 3; Contracts, 19, 37; Executors and Administrators, 2; Fires, 3.

1. *Insurance—Contracts—Policies—Application.*—The statements, agreements and warranties in an application for insurance, are to be construed as a part of the policy thereafter issued, when it is so stated therein. *McCain v. Ins. Co.*, 549.

2. *Same—Livestock—Health—Policy Stipulations.*—Construing a provision in a livestock policy of insurance that the animal must be in good health and entirely free from sickness or injury, and not to be considered as in force until countersigned by the general agent of insurer: *Held*, a policy not so countersigned or delivered until after the death of the insured animal was unenforcible. *Ibid.*

3. *Insurance—Premiums—Extension Notes.*—Stipulation in a note given for the payment of the premium on a policy of life insurance extending the time for payment, that the policy will be void if not paid at maturity, is valid. *Haywortb v. Ins. Co.*, 757.

4. *Same—Payment—Unpaid Checks—Contracts.*—Where a life insurance company accepts a check of the insured for the payment of a premium, or an extension premium note, and the check is not paid by the drawee bank, and when the cancellation of the extension note by the company is upon condition that the check will be paid, and upon its nonpayment, a provision in the note declaring the policy void if the note is not paid by or before maturity, is valid and enforcible. *Ibid.*

INTENT. See Wills, 1, 3, 7; Bills and Notes, 1; Homicide, 8; Contracts, 8, 36; Actions, 10; Estates, 10.

INTERESTS. See Deeds and Conveyances, 15; Evidence, 40.

INTERVENERS. See Claim and Delivery, 1; Pleadings, 6.

INTERVENING CAUSE. See Negligence, 7.

INTOXICATING LIQUOR. See Evidence, 33.

1. *Intoxicating Liquor—Evidence—Turlington Act—Nonsuit.* — A motion for nonsuit upon the evidence on the trial for a violation of the prohibition law, will be denied when, though circumstantial, it is sufficient upon the question of possession and unlawful transportation of intoxicating liquor. *S. v. Meyers*, 239.

INTOXICATING LIQUOR—*Continued.*

2. *Same—Possession—Instructions—Appeal and Error.*—The possession of spirituous liquor in contemplation of the Turlington Act may be either actual or constructive, but must be such as to place it within the control or use of the defendant upon trial, and it is insufficient if it was found upon lands he had leased, with his knowledge of its having been there; and an instruction to the jury otherwise is reversible error. *Ibid.*

3. *Intoxicating Liquors—Spirituous Liquors—Instructions—Appeal and Error—Evidence—Questions for Jury—Statutes.*—Upon the trial under an indictment for violating the prohibition law, there was evidence that an illicit still was found without connecting its operation with the defendant, but that a coat was found there with a receipt with defendant's name on it in one of the pockets: *Held*, an instruction that the name on the receipt was sufficient evidence that it was the property of defendant, and it should be considered to identify the coat, is an expression of an opinion upon the weight and credibility of the evidence inhibited by statute, and reversible error. C. S., 564. *S. v. Allen*, 498.

4. *Intoxicating Liquor—Spirituous Liquor—Statutes—Transportation—Possession.*—Upon the trial for transporting intoxicating liquors in violation of our statute, the purpose of the possession of the intoxicants, or that they were for the purpose of profit, are immaterial, and the fact that the person accused is carrying them from one place to another is sufficient. *S. v. Sigmon*, 684.

5. *Intoxicating Liquor—Spirituous Liquor—Statutes—Transportation—Evidence—Questions for Jury.*—Evidence tending to show that the defendant endeavored to conceal his car along a county highway at night, concealed himself from the officers of the law to whom he soon surrendered, when they were yet at the place; that his car contained no intoxicants, but when the back of the car was opened it smelt of whiskey; that several large bottles with a funnel that smelt of whiskey were found at the place; that another car passed down the road and stopped, and that while the officers were taking the defendant to jail the bottles and funnel had been taken away, is sufficient for conviction of unlawful transportation of spirituous liquor under the provisions of our statute. A load had been transported and the car was stopped with the implements ready to be reloaded. *Ibid.*

6. *Same—Possession.*—Where the evidence is sufficient to convict the defendant of transporting whiskey under our statute, C. S., vol. III, 3411 (a) and (b), the transportation of spirituous liquor includes the possession. *Ibid.*

7. *Same—Issues—Consistent Verdict.*—Where an indictment for violating our prohibition law contains a count as to the unlawful possession and also unlawfully transporting spirituous liquor, an acquittal upon the first is not inconsistent with a conviction on the second issue. They are two distinct offenses under the statute. *Ibid.*

INVENTORY. See Fires, 1.

"ISSUE." See Wills, 5.

ISSUES. See Evidence, 2, 13, 17; Claim and Delivery, 1; Wills, 9; Appeal and Error, 16, 19, 23, 33; Constitutional Law, 9; Contracts, 10; Divorce, 2; Pleadings, 16; Instructions, 6; Intoxicating Liquor, 7.

1. *Issues—Pleadings—Appeal and Error.*—Issues clearly and fully arising from the pleadings and supported by the evidence are not subject to exception that those submitted by appellant should have been accepted by the court. *Elliott v. Power Co.*, 62.

2. *Issues—Pleadings—Evidence.*—Issues must arise from both the pleadings and the evidence properly admitted on the trial. *Book Depository v. Riddle*, 432.

JOINT ACCOUNTS. See Banks and Banking, 8.

JUDGE. See Appeal and Error, 7; Courts, 8.

JUDGMENTS. See Corporation Commission, 1; Principal and Agent, 1; Pleadings, 1, 6; Appeal and Error, 5, 6, 8, 13, 21, 22, 23; Deeds and Conveyances, 20; Government, 2; Liens, 1; Divorce, 2; Homestead, 1; Courts, 4, 5; Actions, 16; Banks and Banking, 8.

1. *Judgments—Liens—Deeds and Conveyances—Registration—Statutes—Color of Title.*—The possession of a grantee under an unregistered deed of lands is not under color of title as against subsequent judgment creditors of his grantor, who have thus obtained their liens on the *locus in quo*, the source of title being a common one. C. S., 3309. *Eaton v. Doub*, 14.

2. *Same—Betterments.*—As against the judgment creditors of a grantor of lands, where the grantee has entered upon the *locus in quo* and made valuable improvements before the docketing of the judgments, the grantee cannot establish his rights to betterments. C. S., 3309, 699, 677. *Ibid.*

3. *Same—Purchasers for Value.*—The grantee under an unregistered deed is not a purchaser for value as against the judgment creditors of his grantor who have acquired their liens on the land subsequent to the entry and possession of the grantee. *Ibid.*

4. *Judgments—Default and Inquiry—Damages—Pleadings.*—A judgment by default and inquiry upon the failure of defendant to answer establishes the plaintiff's right to recover damages, at least nominal, in accordance with his allegations, with the burden on him to show the extent of the damages he has sustained. *Mitchell v. Ahoskie*, 235.

5. *Judgments—Excusable Neglect—Motions—Appeal and Error.*—Upon refusal of plaintiff's motion to set aside a judgment for surprise, mistake or excusable neglect, the findings by the judge below upon these questions adverse to plaintiff are not reviewable on his appeal. *Turner v. Grain Co.*, 331.

6. *Judgments—Motions—Findings—Appeal and Error.*—Where judgment has been awarded in bastardy proceedings in conformity with C. S., 273, Laws of 1921, ch. 109, and upon defendant's motion in the Superior Court the judge has set the judgment aside upon sufficient evidence, the facts found accordingly are not reviewable on appeal to the Supreme Court. *Baker v. West*, 335.

7. *Judgments—Estoppel—Process—Partition — Defects Cured.* — A defect of service of summons on a mental incompetent in proceedings to sell

JUDGMENTS—*Continued.*

lands to make assets, may be cured by thereafter aptly and in due time moving in the cause and curing the defects, and the question of mental capacity thus concluded by the judgment of the court will become final by failure to appeal therefrom. *Baggett v. Smith*, 354.

8. *Judgments—Evidence—Nonsuit.*—A judgment as of nonsuit upon the evidence on defendant's motion will not be granted if the evidence viewed in the light most favorable to the plaintiff, giving him the benefit of every reasonable inference therefrom, is sufficient to sustain a verdict in his favor. *Barnes v. Utility Co.*, 382.

9. *Judgments—Motions to Set Aside Judgments—Surprise and Excusable Neglect—Attorney and Client—Statutes.*—A judgment will not be set aside for irregularity and surprise when it appears that it had come to issue and was regularly set upon the trial docket, and judgment entered in the due course and practice of the court, the only grounds upon which relief is sought being the employment of nonresident local attorneys, who were not notified though means of easy communication in ample time was available, the neglect of the attorneys being personally attributable to the party to the action, whose duty it was also to attend to the action himself, as well as to employ attorneys for the purpose. C. S., 600. *Lumber Co. v. Chair Co.*, 437.

10. *Judgments—Clerks of Court—Statutes.*—The judgments of the clerk of the court rendered within the authority given him by statute, C. S., 515, are judgments of the Superior Court, and have the same effect as those rendered by the judge, and when not appealed from, are final and conclusive. *Williams v. Williams*, 478.

11. *Same—Superior Courts—Pleadings—Amendments—Jurisdiction.* — The Superior Court judge in term has no authority to allow an amendment to the complaint, in an action which has proceeded to final judgment before the clerk of the Superior Court, rendered within his statutory jurisdiction, C. S., 515, and not appealed from. *Ibid.*

12. *Same—Appeal and Error—Motions—Notice.*—If the plaintiff desires to amend his complaint after an adverse opinion of the Supreme Court on appeal affirming the order of the clerk of the Superior Court in dismissing the action, he must give notice thereof within three days after the opinion has been received by the Superior Court. C. S., 515. *Ibid.*

13. *Judgments—Service—Summons — Procedure — Motions.* — A judgment procured contrary to the course and practice of the courts, is voidable, and when made to appear, the court rendering it may set aside, on motion in the cause requiring reasonable promptness and ordinarily a show of merit. *Fowler v. Fowler*, 536.

14. *Same—Divorce—Publication of Service—Statutes—Affidavits.*—The requirements of our statute, C. S., 484, are mandatory, and must be followed in good faith in actions of divorce to obtain an order of publication of service of summons, and where the plaintiff in divorce fails to make affidavit that the defendant cannot after due diligence be found in the State, knowing that she was residing in another county therein, subject to personal service, and the summons has been returned endorsed that defendant cannot be found within the county

JUDGMENTS—*Continued.*

of its issuance, etc., the judgment rendered therein by the Superior Court is void, and may be vacated by the court granting it within its inherent powers. *Ibid.*

15. *Same—Death—Property Rights.*—Where the plaintiff in divorce has obtained a judgment void for irregularity in the service of summons, the same may be set aside on motion in the cause made after the defendant's death, when property rights are involved. *Ibid.*

JURISDICTION. See Constitutional Law, 1, 10; Courts, 2, 8; Elections, 1; Quo Warranto, 1; Actions, 15; Deeds and Conveyances, 16; Equity, 6.

JURY. See Instructions, 4; Trials, 1; Courts, 6.

LACHES. See Reference, 4; Appeal and Error, 36.

LANDS. See Wills, 6; Contracts, 35; Husband and Wife, 1; Statutes, 7.

LANDLORD AND TENANT. See Ejectment, 1; Contracts, 23; Statutes, 2; Guardian and Ward, 1.

1. *Landlord and Tenant—Leases—Ejectment—Statutes—Payment — Tender.*—Under the provisions of C. S., 2372, the lessee in summary ejectment is given the right to tender or pay into court the amount of rent due under the lease to the time of the beginning of the action, with interest and costs, and upon his so doing, the proceedings will be stayed, and the exception of the lessor that all rents whether due under the terms of the contract or not, should be included to the time of the dismissal of the action, is untenable. *Ryan v. Reynolds*, 563.

2. *Same—Nonsuit—Appeal and Error.*—Where there is an appeal from the justice of the peace in ejectment, the jury shall assess all damages of the plaintiff when he is entitled thereto from the time of the unlawful detention to the time of the trial in the Superior Court, and upon the defendant's tendering the amount sued for and the costs to the time, a judgment as of nonsuit is properly allowed. *Ibid.*

3. *Same—Separate—Contracts—Interpretation.*—Where a contract for the lease of land at a specified rent contains a provision giving to the lessee the right to take sand therefrom at a stated price, the lessor in ejectment cannot maintain the position that the lessee should tender or pay for the sand he may thus have used, under the provision of C. S., 2372, as a part of the rental due by him, the contract being construed separately as to the two provisions. *Ibid.*

LAST CLEAR CHANCE. See Negligence, 1.

LAWS. See Contracts, 39.

LAW OF THE ROAD. See Negligence, 12.

LEASES. See Evidence, 3; Wills, 1; Ejectment, 1; Contracts, 23, 48; Landlords and Tenant, 1; Guardian and Ward, 1.

LEGISLATIVE POWERS. See Constitutional Law, 1; Counties, 3.

LETTERS. See Contracts, 48.

LIABILITY. See Schools, 1; Executors and Administrators, 1; Actions, 16.

LIENS. See Equity, 4; Drainage Districts 1; Estates, 11; Deeds and Conveyances, 18; Homestead, 1; Judgments, 1; Mortgages, 1; Mechanic's Lien, 1; Schools, 1.

1. *Liens—Judgments—Transcripts—Docketing—Cross Index.*—Where the transcript of a judgment recovered in H. County is sent to L. County for docketing, the transcript must not only be docketed but must be entered on the cross index, giving the names of all the judgment debtors and the name of at least one plaintiff. C. S., 613, 614. *Trust Co. v. Currie*, 260.

LIGHTNING. See Negligence, 23.

LIGHTS. See Pleadings, 14; Schools, 2.

LIMITATION OF ACTIONS. See Trusts, 1; Dower, 4; Bills and Notes, 3; Government, 1; Waters, 2.

1. *Limitation of Actions—Adverse Possession—"Color of Title"—Common Source of Title—Evidence—Instructions — Appeal and Error.* — Where in an action to recover lands the plaintiff has introduced evidence tending to show a connected chain of title to a grant from the State, and the defendant does not claim under a common source by adverse possession, with or without color, testimony of a witness as to a conversation between himself and such former owner in possession under the deed, in effect that this former owner had told him he had swapped a piece of his own land for the *locus in quo*, tends to show a completed transaction, and a claim under adverse ownership, and an instruction allowing this evidence to be considered by the jury on the question of permissive user or as a tenant at will, is reversible error. *Anderson v. Walker*, 826.

2. *Same—Deeds and Conveyances—Consideration—Registration.*—Where a grantee in a deed to lands upon a valuable consideration fails to have it recorded under the provisions of our registration statute (Connor Act), and enters into possession thereunder, such deed does not constitute color of title as against a subsequent grantee of the same lands for a valuable consideration, by a duly registered deed, when the parties are claiming under a common source of title. *Ibid.*

LIVESTOCK. See Negligence, 2; Insurance, 2.

LOANS. See Counties, 1; Actions, 5; Banks and Banking, 7.

LOCAL LAWS. See Constitutional Law, 2; Statutes, 7.

MALICE. See Arrest, 1; Homicide, 7.

MANDAMUS. See Officers, 3.

MARRIAGE. See Dower, 1; Divorce, 1.

MARRIED WOMEN. See Contracts, 44.

MARSHALING ASSETS. See Bills and Notes, 5; Equity, 3, 4.

MASTER AND SERVANT. See Employer and Employee, 1, 6, 8, 11, 14, 15, 17, 18, 19, 23, 24.

MATERIALMEN. See Banks and Banking, 1; Mechanic's Liens.

MAYOR. See Municipal Corporations, 15.

MEASURE OF DAMAGES. See Deeds and Conveyances, 5; Negligence, 5, 15; Municipal Corporations, 13.

MECHANIC'S LIENS. See Schools, 1.

1. *Mechanics' Lien—Liens—Statutes.*—The rights of laborers and materialmen to acquire liens against the property of the owner for work done upon and material furnished to the contractor in the erection of his building, etc., do not rest by common law but strictly by statute, and the provisions of the statute must be followed for its enforcement; and where the property is not subject to this lien no duty or obligation is imposed upon the owner in respect to such claimants. *Noland Co. v. Trustees*, 250.

MEETINGS. See Corporations, 1.

MENTAL CAPACITY. See Wills, 11.

MESSAGES. See Telegraphs, 1, 3.

MINORS. See Homestead, 3.

MISDEMEANOR. See Actions, 5.

MISREPRESENTATIONS. See Contracts, 26, 27.

MISTAKE. See Contracts, 41.

MONEY. See Trusts, 2; Wills, 8.

MORTGAGES. See Automobiles, 1; Deeds and Conveyances, 18; Estates, 3; Contracts, 13; Equity, 4, 5, 8.

1. *Mortgages — Registration — Payment — Cancellation — Resuscitation—Liens.*—Where the mortgagor has paid a registered mortgage, and the mortgage has been marked "Paid and satisfied," and the mortgagor acknowledges that the note has been "canceled and destroyed," the mortgagor by endorsement thereon or otherwise cannot resuscitate the same in favor of another who has loaned him money, or use the same as collateral therefor, and make it prior in lien to judgment creditors. *Saleeby v. Brown*, 138.

MOTIONS. See Evidence, 1, 16, 29, 30; Pleadings, 1; Appeal and Error, 4, 6, 21; Contracts, 3; Judgments, 5, 6, 9, 12, 13; Actions, 15; Courts, 5; Removal of Causes, 2; Indictment, 2.

MUNICIPAL CORPORATIONS. Corporation Commission, 1; Health, 1; Injunction, 4; Pleadings, 8, 10, 14; Schools, 1, 4; Contracts, 15; Evidence, 23; Government, 3; Negligence, 18; Statutes, 7.

1. *Municipal Corporations—Cities and Towns—Taxation—Street Improvements — Assessments — Statutes.* — The assessments made upon the lands of an owner adjoining a street improved by the authorities of a city or town, will not be declared invalid on the ground of the insufficiency of description in the assessment roll at the suit of such property owners, when in substantial compliance with the statute under which the proceedings were had. C. S., 2711, 2712. *Vester v. Nashville*, 265.

MUNICIPAL CORPORATIONS—*Continued.*

2. *Same—Assessment Rolls.*—As between the abutting landowners upon the street improved by a city or town and the proper municipal authorities acting thereon, the failure of the latter to keep the special assessment book as provided by C. S., 2722, is not fatal to the validity of the assessments, if the original assessment roll or book is accessible, sufficient to give all necessary information of the property assessed, and available upon the statutory notice given. *Ibid.*

3. *Same—Notice—Publication—Hearings.*—Where a city or town has regularly and sufficiently proceeded to assess the lands of property owners abutting a street to be improved under the provisions of our statute, and have published the notice thereof as the law requires, and such owners have been afforded ample opportunity to be heard by the commissioners of the municipality, their failure to appear and resist the assessment thus laid on their property under the proceedings prescribed by the statute will bar their right to impeach the ordinance. C. S., 2711, 2712. *Ibid.*

4. *Municipal Corporations—Cities and Towns—Suits—Taxpayers — Parties.*—It is not required that a taxpayer of and property owner within a municipality first apply to the municipal authorities before seeking injunctive relief from their action affecting the taxpayer's interest, or maintain the position that the municipal corporation was the necessary party plaintiff in the suit. *Murphy v. Greensboro*, 268.

5. *Municipal Corporations—Principal and Agent—Delegated Authority—Judicial Acts—Committees.*—The municipal authorities in passing upon bids for street improvements, C. S., 2830, are acting in a *quasi*-judicial capacity, and may not delegate this power to a subcommittee under an agreement to accept the report of the committee thereon as their own act, and give it validity. *Ibid.*

6. *Municipal Corporations—Cities and Towns—Streets—Dedication—Permissive User.*—Where a store building has been built by the owner several feet from the line of a city street, with projections or pilasters at each side up to the street line, and has excavated the cellar of the store thereto, it is sufficient evidence that no dedication to the public use was intended to be made or actually made by the owner, and the use of this strip of land by the public in going into and out of the store, and for kindred purposes, amounted only to a permissive user. *Durham v. Wright*, 568.

7. *Same—Constitutional Law.*—The principle upon which private property may not be taken for a public use, without just compensation, though not contained in the Constitution of our State, has become a part of our organic law. *Ibid.*

8. *Same—Statutes.*—In order for a city to acquire by condemnation private lands for street purposes under a special statute providing that in the absence of any contract or contracts therewith in relation to lands used or occupied by it for the purposes of streets, etc., it shall be presumed that the land has been granted to it by the owner, unless the owner, etc., at the time apply for an assessment within two years, etc., it must be shown that the *locus in quo* had been taken and adversely used for street purposes for the stated time, and a permissive use is insufficient. *Ibid.*

MUNICIPAL CORPORATIONS—*Continued.*

9. *Same—Prescriptions.*—In order for a municipal corporation to acquire the lands of a private owner under a claim of dedication by prescription, it is required that there must be a continued and uninterrupted adverse use, and a permissive use is insufficient. *Ibid.*

10. *Municipal Corporations—Cities and Towns — Surface Water — Negligence—Streets and Sidewalks—Damages.*—The right of a city to grade and pave its streets passes to the municipality in its original creation, and an action for damages against it from a wrongful diversion of the flow of surface water rests upon the question as to whether the municipality was thereby negligent in causing an excessive flow of surface water upon the lands of an adjoining owner, the plaintiff in an action, causing substantial injury. *Eller v. Greensboro*, 715.

11. *Same—Artificial Drains.*—The pipes and drains placed by a city to carry off the extra flow of surface water caused by street improvements, are construed to be "artificial drains." *Ibid.*

12. *Same—Pleadings—Trials—Appeal and Error.*—Where on the trial in the Superior Court the case against a municipality for damages for the wrongful diversion of surface water upon the lands of an adjoining owner, has been determined, without objection, upon the theory of permanent damages, and the inferences from the complaint are sufficient, the verdict in plaintiff's favor will not be disturbed for the failure of specific allegation of the complaint to that effect. *Ibid.*

13. *Same—Measure of Damages—Trespass.*—The measure of damages, in trespass, when recoverable in an action against a city for negligently diverting a greater volume of surface water upon the lands of an owner adjoining a street improved, is the difference in value of the land before and after the wrongful diversion of the surface water by the municipality. *Ibid.*

14. *Municipal Corporations—Cities and Towns — Surface Water — Negligence—Damages—Constitutional Law.*—The principle upon which a city is answerable in damages to an adjoining owner of lands whose property has been negligently injured by the increased flow of surface water caused by street improvements, rests upon the doctrine of the taking of private property for a public use upon payment of compensation. *Ibid.*

15. *Municipal Corporations—Cities and Towns — Appeal — Certificate of Mayor—Statutes.*—The certificate of the mayor of an ordinance the defendant has been convicted in his court of violating, required by C. S., 2637, is for the benefit of the solicitor in furnishing him ready information as to its existence and provisions, which also may be used in evidence upon the trial in the Superior Court on appeal, and under the provisions of C. S., 1750, it makes out a prima facie case of the existence of the ordinance when the statute is complied with. *S. v. Abernethy*, 768.

16. *Same—"Subscribed."*—The certificate of the mayor of an ordinance the defendant in his court has been convicted of violating, to be used upon the trial in the Superior Court on appeal, is not required to be subscribed or sworn to, and under the facts in this case is *held* to be sufficient, it appearing that the certificate had not been sub-

MUNICIPAL CORPORATIONS—*Continued.*

scribed, but sworn to before a notary public, and placed by the mayor in the case appealed from, C. S., 2637, 1750. This practice unfavorably commented upon by STACY, C. J. *Ibid.*

17. *Municipal Corporations—Cities and Towns—Statutes—"Fines"—Criminal Law—Punishment.*—While formerly the "fine" imposed by a town for the violation of its ordinance is but a penalty which the town may collect by civil suit, (Const., sec. 14, Art. IV), the violation of the ordinance is now by statute made a misdemeanor and punishable as such, and a sentence of 30 days by the Superior Court on appeal is not an unlawful punishment. *Ibid.*

MURDER. See Homicide, 1, 4, 5.

NEGLIGENCE. See Electricity, 1; Homicide, 6; Automobiles, 3; Municipal Corporations, 10, 14; Roads and Highways, 1; Telegraphs, 4, 5; Principal and Agent, 1; Insane Persons, 1, 3; Bailment, 2; Employer and Employee, 1, 5, 6, 8, 15, 17, 18, 23, 24; Government, 4.

1. *Negligence — Last Clear Chance — Pleadings — Evidence — Burden of Proof—Railroads.*—In an action against a railroad company to recover damages for the negligent killing of plaintiff's intestate, a trespasser, wherein from the pleadings and evidence the issue of the last clear chance arises, the burden of proof of the issue shifts back to the plaintiff in the action. *Hudson v. R. R.*, 116.

2. *Negligence—Railroads—Livestock—Turkeys—Prima Facie Case—Burden of Proof.*—Where a railroad train runs into, kills or injures livestock and turkeys of the owner along its tracks, and he brings his action for damages within the statutory six months, the prima facie case of negligence raised by the statute is sufficient to take the case to the jury, but does not change the burden of proving the issue of negligence from the plaintiff. C. S., 3482. *Ferrell v. R. R.*, 126.

3. *Negligence — Railroads — Evidence — Questions for Jury — Nonsuit.*—Where there is evidence tending to show that the defendant railroad company had left a space between cars in its stationary freight train on its yard, where it had continuously permitted its employees and others to pass in large numbers, and plaintiff's intestate, an employee, was killed there by a train, rapidly moving on a close parallel track beyond, coming without signals or the customary warning of its approach: *Held*, the failure of the defendant to give the customary warning on its moving train is sufficient on the issue of its actionable negligence to deny defendant's motion as of nonsuit thereon. *Rigsbee v. R. R.*, 231.

4. *Same—Contributory Negligence—Burden of Proof.*—Under the facts of this case: *Held*, the mere fact that the defendant's employee may not have stopped before going upon the track whereupon he was killed by the defendant's negligence in not giving the customary signals of its approach, did not bar him of his right to recover, as the sole, proximate and efficient cause. *Ibid.*

5. *Negligence—Railroads—Death—Measure of Damages.*—To ascertain the damages recoverable by the administratrix of the deceased for his negligent killing by the defendant, the net-earnings rule requires the jury to deduct only the reasonably necessary personal expenses of

NEGLIGENCE—*Continued.*

the deceased, and not the amount spent by him for his family or dependents, and testimony of a witness relatively construed that bases his estimate upon the witness' knowledge of the habits of the deceased, in this connection is properly admitted. *Ibid.*

6. *Negligence — Railroads — Fires — Prima Facie Case—Evidence — Nonsuit.*—A prima facie case of negligence is made out in an action to recover damages against a railroad company for setting out a fire by its passing trains that destroyed a warehouse and its contents of plaintiffs situated off its right of way, when upon direct or circumstantial evidence it is sufficiently shown that a spark from the train resulted in the fire complained of, and not by circumstance remote as to time and place, which under the evidence in this case are held insufficient; and *Held*, defendant's motion as of nonsuit was properly allowed. *Dickerson v. R. R.*, 292.

7. *Negligence—Intervening Cause—Proximate Cause.*—Where the employer in the exercise of reasonable care was negligent in furnishing his employee a defective skidder or machine for handling or loading logs on cars, which resulted in a log falling striking a small tree on its way down hill and rebounding upon the employee to his injury and death: *Held*, the negligent act of the employer reaches through to the resultant injury, and the doctrine of intervening or independent cause has no application. *Paderick v. Lumber Co.*, 308.

8. *Negligence—Automobiles—Evidence—Statutes — Nonsuit.* — It is negligence *per se* to drive an automobile upon a public highway at a speed greater than that permitted by statute, C. S., 2616, 2618, and where in an action to recover damages for the negligent killing of plaintiff's intestate, a voluntary passenger in the car thus driven, a motion as of nonsuit upon such evidence is properly denied. *Albritton v. Hill*, 429.

9. *Same—Passengers.*—In an action to recover damages for the killing of plaintiff's intestate caused by the negligent driving of the defendant of his automobile in which the intestate was a passenger, concurring with the negligence of the Highway Commission in leaving a road it was having constructed at night without a light or other signal of danger, these allegations of the complaint distinctly made are sufficient to sustain an action against the driver of the automobile. *Ibid.*

10. *Same—Proximate Cause—Concurring Causes.*—Where two proximate causes arising from negligence contribute to an injury, and one of them is attributable to the defendant in an action for damages for the negligent killing of plaintiff's intestate, the defendant is liable if his negligent act brought about one of these causes. *Ibid.*

11. *Same—Common Enterprise.*—The negligent driving of the owner of the car or his agent, is not attributable to a passenger therein who has no authority over him or control over the car or the manner in which it was being driven at the time his injury was caused, the subject of his action for damages, nor will the principles of law applicable to those engaged in a common purpose apply from the fact that the injured party and the driver of the car were riding together to the same destination. *Ibid.*

NEGLIGENCE—*Continued.*

12. *Negligence—Evidence—Automobiles—Statutes—"Law of the Road"—Negligence per se—Nonsuit.*—Upon evidence that the plaintiff was about in the middle of the street in a city after dark, assisting one whose buggy had been injured in a collision with an automobile, on a dark and stormy night, and that the defendant approached at a speed exceeding that allowed by law at such places, without signal or warning, where plaintiff could be seen by the light from a street lamp, with room to pass him without injury, and caused the injury complained of in the action: *Held*, the violation of the statute and ordinances enacted under statutory authority, under the circumstances was evidence of the defendant's negligence *per se*, and sufficient to deny defendant's motion as of nonsuit thereon, C. S., 2616, and 2618, amended by ch. 272, Public Laws of 1925. *Fleming v. Holleman*, 449.

13. *Same—Contributory Negligence — Burden of Proof.* — The burden of showing contributory negligence is on the defendant pleading it; and, *Held*, where the evidence of defendant's actionable negligence is shown, the issue should be submitted to the jury. *Ibid.*

14. *Negligence—Killing of Deceased—Damages—Statutes.*—At common law, a civil action would not lie against one who had negligently caused the death of another, but now exists to the personal representative of the deceased by statute. C. S., 161. *Purnell v. R. R.*, 573.

15. *Same—Measure of Damages.*—The measure of damages for negligently causing the death of another, is the present value of the net income to the estate, to be ascertained by deducting the cost of living of the deceased, and his necessary personal expenditures, from the gross income to be ascertained from his expectancy of life, of which the mortuary tables may be received in evidence, with proof as to the condition of his previous health, etc. *Ibid.*

16. *Same—Instructions.*—Construing the charge as a whole from its related parts: *Held*, an instruction is not erroneous as to the measure of damages for the negligent killing of another, which charges that his probable expenditures, etc., are to be deducted from the gross income when from connected parts of the charge the jury must reasonably have understood that it was the necessary personal expenses which they should deduct. *Ibid.*

17. *Negligence—Charter.*—A child under four years of age is incapable of negligence, primary or contributory. *Campbell v. Laundry*, 649.

18. *Same—Automobiles — Municipal Corporations — Traffic Ordinances.* — Where the driver of an electric truck, in the performance of his duty to his employer, leaves the truck parked on the side of a frequented street, in violation of a city ordinance, with the electric plug in and brakes unset so that it could readily be started, the owner is liable for the death of a child four years of age who climbed upon the wheel of the truck, started it in operation, and was thrown thereby to his death. *Ibid.*

19. *Same—Proximate Cause.*—The violation of a city ordinance in parking a truck on the wrong side of a street, while negligence *per se*, the negligence must be the proximate cause of the injury alleged in order to sustain an action for damages. *Ibid.*

NEGLIGENCE—*Continued.*

20. *Same—Attractive Nuisance.*—An electric delivery truck is not an "attractive nuisance," but a recovery may be had when it is negligently left on a city street ready to start, and a child of tender years sets it going and its death is thereby proximately caused, under circumstances from which the result should have reasonably been anticipated in the exercise of ordinary care. *Ibid.*

21. *Negligence—Evidence—Inferences.*—While the facts in issue may not be established by evidence that leaves an inference for the jury of mere possibility or conjecture, it is otherwise sufficient to sustain a verdict of actionable negligence if the matters testified to, though circumstantial, will reasonably admit of the conclusion sought to be proven by the plaintiff in the action. *Lawrence v. Power Co.*, 664.

22. *Same — Electricity — Right of Way — Transmission Line — Nonsuit.* — Where an electric transmission power company maintains towers across the plaintiff's land upon which are strung wires, with evidence that they were insulated sufficiently for the passage of the voltage of electricity for its commercial purposes, that one of these insulator cups became moulton from an excessive current of electricity and fell upon the defendant's foul right of way and at the time and place fire was communicated to plaintiff's lands to his damage, it is sufficient upon which the jury may answer the issue as to the defendant's actionable negligence in the plaintiff's favor, and to deny the defendant's motion as of nonsuit. *Ibid.*

23. *Same—Act of God—Lightning—Concurring Negligence.*—Where there is evidence tending to show that the damage to plaintiff's land was by fire originating on the foul right of way of the defendant electric power transmission company, by reason of an insufficient insulation of its wires, and its foul right of way and that a stroke of lightning upon its wires caused the injury: *Held*, though the defendant would not ordinarily be held liable for the damage caused solely by the act of God, it would not be excused if the injury would not have occurred except for its own negligence in not reasonably having anticipated the occurrence, and permitting its right of way to have become and remained in a foul or inflammable condition. *Ibid.*

24. *Negligence — Evidence — Proximate Cause — Burden of Proof — Electricity.*—In an action to recover damages for the death of an employee caused by the negligence of defendant, evidence which tends to show that the deceased was employed in defendant's store operated in connection with defendant's cotton mill, and also to a refrigerating plant operated by electricity in a room opening into the store; that the deceased was found dead in the refrigerating room and that the metal parts within the room were charged with a deadly voltage of electricity caused by the live wires carrying the electricity not being properly grounded: *Held*, sufficient upon the issue of defendant's actionable negligence as the proximate cause of the death to take the case to the jury, with the burden of proof on plaintiff. *Gibson v. Steeles' Mills*, 760.

25. *Negligence—Contributory Negligence—Evidence—Instructions—Directing Verdict.*—Where an employee is killed by the negligence of his employer for failing to properly ground electric wires in a refrigerating plant where the employee was required to go in the discharge of his

NEGLIGENCE—*Continued.*

duties, and the answer alleges that the deceased would have been safe had he confined himself to a part of the room where his duties required him, upon the plea of contributory negligence it was necessary for the defendant to offer evidence upon the ground of his defense, and on his failure to have done so it was not error for the trial judge to direct a verdict in plaintiff's favor upon the issue. *Ibid.*

NEGOTIABLE INSTRUMENTS. See Bills and Notes, 4, 6, 7; Banks and Banking, 5; Carriers, 2.

NEWLY DISCOVERED EVIDENCE. See Appeal and Error, 4.

NEWSPAPERS. See Gaming, 1; Principal and Agent, 4.

NEW TRIALS. See Appeal and Error, 4; Executors and Administrators, 3; Instructions, 15, 16.

NONDELEGABLE DUTIES. See Principal and Agent, 1; Employer and Employee, 20, 22.

NONSUIT. See Evidence, 1, 12, 14, 15, 16, 25, 29, 30, 37, 38; Bills and Notes, 1; Electricity, 1; Bailment, 4; Intoxicating Liquor, 1; Negligence, 3, 6, 8, 12, 22; Employer and Employee, 6, 15, 23; Deeds and Conveyances, 12; Judgments, 8; Actions, 11; Landlord and Tenant, 2.

NOTICE. See Deeds and Conveyances, 4; Trusts, 1; Municipal Corporations, 3; Judgments, 12; Principal and Agent, 3; Reference, 2; Employer and Employee, 21; Sheriffs, 1.

NUISANCE. See Injunction, 1; Pleadings, 8; Negligence, 20.

1. *Nuisance—Special Damages—Pleadings—Evidence.*—A civil action for damages for the maintenance of a public nuisance, without allegation or evidence that the plaintiff has been specially or peculiarly damaged, will not lie; and where the damages are recoverable the plaintiff must allege and show an injury suffered by himself. *Elliott v. Power Co.*, 62.

OBJECTIONS AND EXCEPTIONS. See Appeal and Error, 6, 8, 18, 24, 25, 26; Actions, 2; Elections, 2; Homicide, 2, 3; Criminal Law, 8; Evidence, 40.

OCCUPANCY. See Wills, 1.

OFFER. See Contracts, 47.

OFFICE. See Elections, 1; Quo Warranto, 1.

OFFICERS. See Actions, 6; Banks and Banking, 7; Executors and Administrators, 2.

1. *Officers—Sheriffs—Counties—Courts—Trial by Jury—Statutes.*—In an action to compel the sheriff to turn over the property of a county to another alleged to have been properly appointed and inducted into office as his successor, the title to the office is not involved, and the cause is properly returnable before the judge in chambers, the matters controverted both as to fact and law not requiring the intervention of a jury under the provisions of C. S., 868. *Lenoir County v. Taylor*, 336.

OFFICERS—*Continued.*

2. *Officers—Sheriffs—Accounting—County Commissioners—Bonds.*—Where the sheriff has failed or refused to pay over the moneys he has collected as such to the proper county officials, C. S., 3926, it becomes the duty of the county commissioners, under the provisions of C. S., 3931, 3932, passed in pursuance of our Constitution, Art. VII, sec. 2, to require him to produce the receipts for his disbursements to the proper county officials, before accepting his bond as a prerequisite to his induction into office. *Ibid.*

3. *Same—Mandamus.*—A mandamus at the suit of the county commissioners will lie to compel a sheriff wrongfully holding over from a preceding term, to turn over the county property pertaining to his office to his successor, lawfully appointed, qualified and inducted therein. *Ibid.*

OFFICIAL BONDS.

1. *Official Bonds—Actions — Parties.* — One whose property has been attached by a sheriff, under a warrant issued in an action to which he is not a party, may intervene or interplead in the action and claim ownership, and obtain an order for the release of the property attached, C. S., 829, 840; or he may bring action against the sheriff and the sureties on his official bond for the property or damages for its conversion, or against the plaintiff in the action at whose instance the warrant was issued, and the property wrongfully attached with option of joining the sheriff therein, or if the sheriff has taken an indemnity bond he may sue the obligor and sureties thereon. *Flowers v. Spears*, 748.

OFFSET. See Statutes, 3.

1. *Offset—Counterclaim.*—An offset in part of a debt due is not a payment *pro tanto*, but an allowance made to the credit of the one owing the other a larger amount, or the balancing of the accounts when both are in an equal amount. *King v. Davis*, 737.

OPINIONS. See Evidence, 7, 20, 22; Criminal Law, 1; Instructions, 4, 7; Appeal and Error, 34.

OPINION EVIDENCE. See Evidence, 2.

ORDERS. See Reference, 6.

ORDER NOTIFY. See Carriers, 2.

ORDINANCES. See Negligence, 18.

ORDINARY CARE. See Executors and Administrators, 2.

OWNERSHIP. See Sheriffs, 1.

PARENT AND CHILD. See Automobiles, 3.

PAROL AGREEMENT. See Contracts, 40.

PAROL EVIDENCE. See Contracts, 1, 9, 34; Statute of Frauds, 3.

PAROL TRUSTS. See Dower, 1.

PARTIES. See Telegraphs, 3; Removal of Causes, 3, 5; Actions, 1; Schools, 6; Municipal Corporations, 4; Banks and Banking, 3, 7; Carriers, 2; Appeal and Error, 25; Official Bonds, 1; Deeds and Conveyances, 14, 20, 22; Evidence, 36; Reference, 2; Bills and Notes, 8; Drainage District, 1.

PARTITION. See Judgments, 7.

PARTNERSHIP. See Trusts, 6.

1. *Partnership — Dissolution — Banks and Banking — Insolvency — Dividends—Contracts.*—Where upon a dissolution the partners agree to the portion each should have from the firm deposit in a bank in the hands of a receiver, and a debt due by one partner to the bank is offset against the firm's deposit, without the knowledge of the other, a dividend of the insolvent bank paid to the party who has offset his individual debt to the bank, is due and payable by him to his copartner, to the same extent and in the same amount as if no offset had been effected. *King v. Davis*, 737.

PASSENGERS. See Negligence, 9.

PAYMENTS. See Principal and Surety, 2; Mortgages, 1; Bills and Notes, 1, 6; Banks and Banking, 1; Principal and Agent, 2; Trusts, 2; Equity, 4; Landlord and Tenant, 1; Insurance, 4.

PENALTIES. See Carriers, 4.

PENDENCY OF ACTION. See Appeal and Error, 30.

PERFORMANCE. See Contracts, 29, 33.

PERSONAL INJURY. See Evidence, 17.

PHOTOGRAPHS. See Evidence, 6.

PLAYGROUNDS. See Education, 1.

PLEADINGS. See Instructions, 1, 14; Actions, 10; Issues, 1, 2; Demurrer, 1; Nuisance, 1; Negligence, 1; Courts, 1; Evidence, 11, 41; Bailment, 4; Judgments, 4; Banks and Banking, 4; Employer and Employee, 17; Contracts, 25, 38, 46; Municipal Corporations, 12.

1. *Pleadings—Motions—Demurrer—Judgments—Statutes.*—Plaintiff's motion for judgment upon the pleadings after answer filed is in effect a demurrer thereto, and will be denied if the answer, liberally construed, sets forth a sufficient defense to the complaint. C. S., 532. *Pridgen v. Pridgen*, 102.

2. *Pleadings—Evidence—Contracts—Vendor and Purchaser—Warranty.*—In the absence of proof as well as allegation in a suit upon a note given for fertilizers that the fertilizers were specially warranted for growing potatoes, a counterclaim based thereon cannot be recovered against the seller, the plaintiff in the action. *Swift v. Etheridge*, 162.

3. *Same—Fertilizers—Statutes—Consideration—Caveat Emptor.*—The requirements of our statute, C. S., 4697, with regard to fertilizers sold in North Carolina, requiring an analysis by the State Chemist and the branding accordingly of the bags or packages in which they are delivered to the purchaser, is to prevent the sale of worthless fertilizer, and where in an action upon a note given therefor it is established that the fertilizer given in consideration of the note is worth-

PLEADINGS—*Continued.*

less, there is a failure of consideration, and the plaintiff, the seller thereof, may not recover upon the note notwithstanding there was no express warranty as to the quality of the goods in the contract of sale, and the common-law rule of *caveat emptor* has no application. C. S., 4690. *Ibid.*

4. *Pleadings—Fraud—Allegations.*—In order to avoid a contract on the ground of its procurement by fraud, the pleadings must allege facts sufficient to constitute the fraud so that this sufficiency may be passed upon by the court, and the pleader's conclusion of law alone is not sufficient to admit his evidence upon the trial. *Colt v. Kimball*, 169.

5. *Pleadings—Demurrer—Courts.*—Demurrer *ore tenus* may be taken to the sufficiency of the complaint to state a cause of action at any time during the progress of the trial, in the Superior or in the Supreme Court, on appeal or the Courts may pass upon the question *ex mero motu*. *Snipes v. Monds*, 190.

6. *Pleadings—Actions—Interveners—Judgments.* — An interpleader in an action is not entitled to judgment upon ground that the plaintiff has not answered his interplea, when it appears that the complaint was filed after the interplea containing allegations sufficient to sustain the plaintiff's contention, and in complete denial of the allegations of the interplea. *Sitterson v. Speller*, 192.

7. *Pleadings—Allegations—Demurrer—Negligence—Torts.*—Remote inferences will not be drawn from the allegations in the complaint when necessary to sustain the cause of action; and, *Held*, in an action of tort to recover damages of a telephone company allegations that the failure of the telephone operator to make a connection with the city fire department caused damages by fire to plaintiff's house, resulting in a delay of the department to reach the fire in time to extinguish it, are alone insufficient and a demurrer thereto is properly sustained. *Whitehead v. Telephone Co.*, 197.

8. *Pleadings—Damages—Nuisance—Burden of Proof—Sewage—Municipal Corporations—Instructions—Appeal and Error.*—Though in proper instances permanent damages may be recovered in an action against a town caused by the improper emptying of its sewer upon the plaintiff's land, it is necessary that an issue to that effect be raised by the pleadings with supporting evidence; and where it is alleged that the town had acquired by condemnation the right to construct and maintain the sewer on plaintiff's land with an outlet beyond that would not have caused the damages complained of, the amount of damages recoverable are only what the plaintiff has sustained up to the trial of the action. *Mitchell v. Ahoskie*, 235.

9. *Pleadings—Demurrer.*—A demurrer to a complaint will not be sustained when the various material matters alleged separately, or any of them, construed with the legal inferences permissible therefrom, are sufficient, if established, to state a cause of action. *Murphy v. Greensboro*, 269.

10. *Pleadings—Speaking Demurrer—Municipal Corporations — Cities and Towns—Charter.*—A demurrer to an action that relies upon the private charter of a city (defendant) in addition to the cause of action stated in the complaint, is bad as a "speaking demurrer." *Ibid.*

PLEADINGS—*Continued.*

11. *Pleadings—Evidence—Variation—Appeal and Error.*—*Held*, the proof in this case was not at sufficient variation with the allegations of the complaint as to make its admission reversible error. *Paderick v. Lumber Co.*, 308.

12. *Pleadings—Demurrer—Banks and Banking—Receivers—Unpaid Cashier's Check.*—Where a bank gives a cashier's check in exchange for a check of its depositor, and afterwards becomes insolvent and is in the hands of a receiver, and the cashier's check has not been paid, the receiver must return the original check upon return of the cashier's check for which it was given, and upon demurrer to the complaint: *Held*, the issues upon conflicting evidence were for the jury to determine. *Tennant v. Bank*, 364.

13. *Pleadings—Demurrer.*—A complaint will be sustained as against a demurrer when its allegations, liberally construed, C. S., 535, are sufficient in law to sustain the plaintiff's cause of action. *Conrad v. Board of Education*, 389.

14. *Same—Education—Municipal Corporations—Schools—Electric Lights—Contracts.*—Where in his complaint against a county board of education the plaintiff alleges a contract for equipping a high school for electric lights and connecting it with a plant of another town to furnish electricity, its completion and use in the buildings for this purpose and the amount of the contract price due and unpaid, a demurrer thereto is bad. *Ibid.*

15. *Same—Statutes.*—The provisions of C. S., vol. III, sec. 5468, do not require that the plans for lighting and furnishing electricity for a public school building shall be approved by the State Superintendent of Public Instruction, and a demurrer to a complaint in an action by the contractor to recover of the county board of education for the amount of a completed contract for failure to so allege, is bad. *Ibid.*

16. *Pleadings—Answer—Personal Transactions—Denials—Issues—Statutes.*—In an action to recover upon an indemnity bond an allegation of the complaint that defendant signed as surety, is one of a personal transaction, and answer that defendant signed some paper, but has no information or belief as to whether the instrument sued on was the one he signed, is insufficient to raise the issue under the provisions of our statute, C. S., 519, 543, 582. *Book Depository v. Riddle*, 433.

17. *Pleadings—Demurrer—Cause of Action—Supreme Court—Courts.*—Demurrer to the sufficiency of the allegations of the complaint to state a cause of action may be taken for the first time in the Supreme Court, or the court may dismiss the action *ex mero motu*, when proper, and in such instances for the demurrer to be good, the pleadings must be construed in the light most favorable to the plaintiff, and sustained if the cause of action is sufficiently alleged. *Smith v. Smith*, 764.

18. *Pleadings—Amendments—Courts—Appeal and Error.*—Amendments to the pleadings may be allowed by the trial judge that do not substantially change the cause of action, at the request of a party, or may do so *ex mero motu* to conform the pleadings to the evidence introduced under such circumstances; and where this discretion is not abused by him, his action therein is not reviewable on appeal. *Dorsey v. Corbett*, 783.

PLEADINGS—*Continued.*

19. *Same—Principal and Agent—Sales—Commissions.*—In an action to recover the amount of commissions alleged to be due an agent for the sale of lands, an amendment to conform the complaint to the evidence, that alleged the defendant was to pay this commission whether the property was sold either by the plaintiff, the owner, or another, did not substantially change the cause of action, and this allowance of amendment by the trial judge was not reversible error, but rested within his discretion. *Ibid.*

20. *Pleadings—Amendments—Discretion of Court—Statutes.*—With a view to substantial justice the allegations of a pleading will be liberally construed (C. S., 535); and where the trial judge may permit an amendment within his sound discretion allowed by statute, unless the complaining party show, to the satisfaction of the court, that he would be unlawfully prejudiced thereby, or where the variance is not material, the judge may direct the fact to be found according to the evidence, or may order an immediate amendment without cost. C. S., 552. *Ibid.*

POLICE POWERS. See Health, 1; Deeds and Conveyances, 16.

POLICY. See Contracts, 19, 37; Insurance, 1, 2; Removal of Causes, 4.

PONDING WATER. See Evidence, 1, 4; Waters, 1.

POSSESSION. See Intoxicating Liquor, 2, 4, 6; Contracts, 23.

POWERS. See Wills, 2; Schools, 4; Courts, 4; Education, 2.

PREJUDICE. See Actions, 3.

PREMEDITATION. See Homicide, 4.

PREMIUMS. See Insurance, 3.

PRESCRIPTION. See Municipal Corporations, 9; Statute of Frauds, 2.

PRESUMPTIONS. See Corporation Commission, 1; Statutes, 6; Corporations, 1; Appeal and Error, 11, 31, 35; Willis, 7, 9; Criminal Law, 9; Banks and Banking, 8.

PRIMA FACIE CASE. See Contracts, 2; Telegraphs, 4; Negligence, 2, 6; Evidence, 13, 19; Carriers, 5.

PRINCIPAL AND AGENT. See Counties, 2; Municipal Corporations, 5; Pleadings, 19; Process, 1; Banks and Banking, 5; Employer and Employee, 11; Trusts, 6; Contracts, 13, 35, 44; Government, 4; Telegraphs, 6; Automobiles, 3; Insane Persons, 2.

1. *Principal and Agent — Negligence — Vice Principals — Nondelegable Duties—Verdict—Judgments.*—While damages against the principal may not be recovered when dependent solely upon the negligence of its employees, upon allegations and evidence that the failure of the principal had proximately caused the injury in suit from its failure to perform a nondelegable duty to provide for the safety of its employee, the plaintiff in the action, a motion to set aside a verdict only against the principal, when others of its employees as vice

PRINCIPAL AND AGENT—*Continued.*

principals were likewise parties to the action, and to sign a judgment also exonerating the principal from liability, is properly denied. *Nichols v. Fibre Co.*, 1.

2. *Principal and Agent—Special Agency—Bills and Notes—Payment - Attorney's Fees—Contract—Consideration.*—Where an agent has only the authority to pay a note due by his principal out of moneys in his hands, it is a special agency for that purpose, and where suit has been instituted on the note and costs incurred therein, the amount due upon the note is the principal, interest and court costs that have accrued to that time, exclusive of counsel fees, which are not recoverable, C. S., 2983, for which there is no consideration. *Hooper v. Trust Co.*, 423.

3. *Same—Notice—Excess Payment—Trusts — Actions.* — Where a special agent for the payment of a note due by his principal to a bank has exceeded his authority in payment of the bank's attorneys' fees in a suit it had commenced thereon, and the bank has actual knowledge of the agent's limited authority, the money thus wrongfully collected by the bank is held by it to the use of the principal, and he may maintain his action to recover it. *Ibid.*

4. *Principal and Agent—Scope of Agent's Authority—Ratification—Newspaper Circulation Contest.*—Where the plaintiff has been induced by the false and fraudulent representation of the agent of a newspaper in a circulation campaign, to pay out her own money for subscriptions for newspapers, sent by her to other persons, and has knowingly retained the money: *Held*, upon the principle of ratification of an agent's act the defendant newspaper may not avoid liability upon the ground that the agent was acting beyond the scope of his authority to the plaintiff's knowledge. *Waggoner v. Publishing Co.*, 829.

PRINCIPAL AND SURETY. See Banks and Banking, 1; Contracts, 10; Actions, 12.

1. *Principal and Surety—Contracts—Bonds.*—A surety on a building contractor's bond has a substantial right in the equity created by a provision reserving a part of the contract price until completion. *Ins. Co. v. Durham County*, 58.

2. *Same—Equity—Payments.*—The owner has an equity in the reserved balance provided for in a building contract, but has no right to waive surety's rights therein. *Ibid.*

3. *Same—Written Contracts.*—The written contract fixes the right and determines the liability of a surety. *Ibid.*

4. *Same.*—Contracts are strictly construed as to sureties to the end that their liability must be found within the terms thereof. *Ibid.*

5. *Same—Checks Unpaid.*—Unpaid checks themselves do not constitute payments. *Ibid.*

PRIORITIES. See Deeds and Conveyances, 18.

PROBABLE CAUSE. See Indictment, 1.

PROCEEDS. See Carriers, 1.

PROCESS. See Comity, 2; Reference, 4; Appeal and Error, 17; Judgments, 7, 13; Courts, 3.

1. *Process—Summons—Service—Principal and Agent—Statutes.*—A local agency for a foreign corporation acting as its general sales agent, and collecting and receiving money in such capacity, is of such character as to make it an agency upon which service of summons for the foreign corporation can be made under our statute, C. S., 483; but if not, valid service may be made under the provisions of and in conformity with our statute, C. S., 1137, by service of summons on the Secretary of State, etc., if it appear that the defendant is doing business in this State without appointing a local process agent. *R. R. v. Cobb*, 375.

2. *Process—Wrongful Death—Statutes.*—In order to recover damages for the negligent killing of plaintiff's intestate, this enabling statute provides that the action "may" be commenced in one year: *Held*, the word "may" is construed as "must." *McGuire v. Lumber Co.*, 806.

3. *Process—Summons—Clerks of Court—Term—Discontinuance.*—Under our procedure in order to expedite the trial of causes, the summons is made returnable before the clerk of the court, at a certain time, which time corresponds to a term of the court under the former act, and where a summons in an action for damages for a wrongful death has been returned unserved, the failure of the plaintiff to move before the clerk of the court for an alias summons on or before the return day thereof works a discontinuance of the action. C. S., 480. *Ibid.*

PROFITS. See Highways, 1.

PROMISE. See Contracts, 6.

PROPERTY. See Judgments, 15; Removal of Causes, 1.

PROXIMATE CAUSE. See Negligence, 7, 10, 19, 24; Government, 5.

PUBLICATION. See Municipal Corporations, 3; Judgments, 14.

PUBLIC INTERESTS. See Injunction, 3.

PUBLIC POLICY. See Contracts, 49.

PUBLIC SCHOOLS. See Education, 1.

PUNISHMENT. See Constitutional Law, 3; Municipal Corporations, 17.

PURCHASERS. See Judgments, 3; Deeds and Conveyances, 4; Equity, 5.

QUANTUM MERUIT. See Contracts, 45.

QUANTUM OF PROOF. See Trusts, 5.

QUASHING. See Indictment, 3.

QUESTIONS FOR JURY. See Negligence, 3; Evidence, 1, 13; Ejectment, 1; Trusts, 5; Bills and Notes, 1; Vendor and Purchaser, 1; Criminal Law, 7; Intoxicating Liquor, 3, 5.

QUESTIONS OF LAW. See Counties, 1; Vendor and Purchaser, 1.

QUO WARRANTO. See Elections, 1.

1. *Quo Warranto—Public Office—Elections—Courts—Jurisdiction.* — Quo *warranto* or an information in the nature of *quo warranto* is the procedure to try the title to a public office between rival claimants thereto, when one is in possession thereof under a claim of right and in the exercise of its official functions, or the performance of its official duties, and is within the jurisdiction of the Superior Court, which is not ousted by declaration of the board of canvassers as to the result of the election or the issuance of a certificate of election. *Harkrader v. Lawrence*, 441.

RAILROADS. See Negligence, 1, 2, 3, 5, 6; Carriers, 1; Employer and Employee, 14; Electricity, 1.

RATIFICATION. See Telegraphs, 5; Principal and Agent, 4.

REASONABLE DOUBT. See Appeal and Error, 35; Evidence, 32.

REASONABLE TIME. See Contracts, 15.

REBUTTAL. See Evidence, 5.

RECEIVERS. See Actions, 1, 8; Banks and Banking, 2, 3; Pleadings, 12; Corporations, 3.

RECITALS. See Deeds and Conveyances, 6; Estates, 12.

RECORDS. See Appeal and Error, 5, 9, 14, 21, 27, 35; Deeds and Conveyances, 23.

RECORDER'S COURTS. See Constitutional Law, 1.

RECOUPMENT. See Statutes, 3.

REFERENCE.

1. *Reference—Remanding Cause—Hearings.* — Where the trial judge in passing upon the report of the referee to hear evidence, finds the facts therefrom, and reports them with his conclusions of law, sustains it only in part, and refers the case to the same referee "to find facts and state conclusions of law upon the issues," etc., the order of remand was for the purpose and comprehended only a revision of his findings and conclusions upon the evidence already taken before him. *Coleman v. McCullough*, 590.

2. *Same—Evidence—Notice to Parties.*—Where a case has been remanded to the referee for his findings and conclusions upon the evidence already taken before him without objection, and a party had made no request for a further hearing or the introduction of further evidence, upon a restatement by the referee of his report, it is not requisite that the referee give him notice. *Ibid.*

3. *Same—Cumulative Evidence—Discretion of Court.*—The further report of a referee after the case has been remanded and approved by the trial judge, will not be disturbed on appeal to the Supreme Court for the mere failure to receive cumulative evidence, as this is addressed to the sound discretion of the trial judge. *Ibid.*

4. *Same—Procedure—Filing Report—Laches.*—Where the cause is referred to a referee, a party thereto is affected with notice of the various

REFERENCE—*Continued.*

steps taken during the progress of the trial, including the filing of the report of the referee, and his failure on this account to file his exceptions in apt time will not excuse his laches in so doing. *Ibid.*

5. *Same—Findings—Exclusion of Evidence.*—A case will not be remanded to a referee upon the ground that evidence should have been taken on the question as to the measure of damages in the movant's favor for breach of contract, when the referee has found upon sufficient evidence, that the opposing party had not breached it, and this finding had been approved by the trial judge. *Ibid.*

6. *Reference—Orders.*—It is suggested that the trial judge in remanding a case to a referee, point out the special purpose of the recommittal, in order to avoid confusion or controversy therein. *Ibid.*

REFORMATION OF INSTRUMENT. See Equity, 1; Estates, 7.

REGISTRATION. See Judgments, 1; Limitation of Actions, 2; Mortgages, 1; Dower, 3; Contracts, 14; Deeds and Conveyances, 18, 21.

RELATIONSHIP. See Wills, 12.

RELEASE. See Bills and Notes, 8, 9.

RELIGION. See Estates, 2.

REMAINDERS. See Deeds and Conveyances, 9; Estates, 13, 15, 17.

REMAND. See Appeal and Error, 26; Reference, 1; Removal of Causes, 2.

1. *Removal of Causes—Transfer of Causes—Injunction—Equity—Personal Property—Statutes.*—Where injunctive relief is sought in a suit against the receiver of a corporation from the sale of cotton and manufactured products therefrom, and the delivery of the cotton and goods to the plaintiff, the nature of the action will be determined from the relation of the parties, their agreement upon the subject-matter of the suit, and the allegations of the complaint, and it appearing therefrom that the relief sought is not the recovery of the debt or to enjoin a sale, but the recovery of the specific personal property with the injunctive restraint as an incident thereto, the cause is properly removable to the Superior Court of the county, under our statute, where the personal property is situated. C. S., 463. *Fairley v. Abernathy*, 494.

2. *Removal of Causes—Transfer of Causes—Motions—Remand.*—Where a cause has been transferred to another county than the one in which it was brought, on the ground of local prejudice, and two terms of court have been held in the latter county before the record or transcript has been received, and no steps have been taken to have it remanded until called for trial: *Held*, the order of removal may not be stricken out as a matter of right by the objecting party. *Dunbar v. Tobacco Growers*, 608.

3. *Removal of Causes—Federal Statutes—Diversity of Citizenship—Parties—Separable Controversies.*—Where upon motion to remove a cause from the State to the Federal Court under the provisions of the Federal Statutes for diversity of citizenship and separable contro-

REMAND—*Continued.*

versies, and contested upon the ground that a resident defendant was united, the motion will be granted if the suit is separable, and the resident defendant is not an indispensable party to the determination of the controversy between the plaintiff and the nonresident defendant. *Timber Co. v. Ins. Co.*, 801.

4. *Same—Insurance—Policies—Coinsurance Clauses.* — Where the "coinsurance clause" of a fire insurance policy limits the liability of a defendant insurance company and makes it ratable with other companies who have issued fire policies upon the property destroyed, upon a motion by a nonresident company to remove the cause from the State to the Federal Court, the fact that one of the coinsuring companies is a resident defendant is not sufficient to deny the motion, such defendant not being an indispensable party to the determination of the suit against the movant nonresident company, and the controversy being separable as to the cause of action alleged against it and fully determinable without the presence of the resident defendant. *Ibid.*

5. *Same—Proper Parties—Necessary Parties.*—While it is expedient to sue all insurance companies whose policies cover a loss by fire in the same action, yet the causes are separable, upon motion to remove the cause by a nonresident defendant to the Federal Court for diversity of citizenship, and while resident defendants are proper parties they are not indispensable ones. *Ibid.*

6. *Same—Entire Controversy.*—Upon motion to remove a cause from the State to the Federal Court for diversity of citizenship, where movant is a nonresident and the controversy separable, and the resident defendant is only a proper party, the entire cause is now properly removed under the provisions of the existent Federal Statutes. *Ibid.*

REPORT. See Reference, 4.

REPUGNANCY. See Statutes, 9.

REQUESTS. See Instructions, 5, 9; Evidence, 40.

RES GESTÆ. See Insane Persons, 2.

RESIDENCE. See Divorce, 2.

RESIDUARY CLAUSE. See Wills, 6.

RESPONDEAT SUPERIOR. See Employer and Employee, 12.

RESTRICTIONS. See Deeds and Conveyances, 22, 23.

RESULTING TRUSTS. See Trusts, 4.

RESUSCITATION. See Mortgages, 1.

REVERSION. See Estates, 16, 17.

REVERTER. See Injunction, 5.

REVIEW. See Injunction, 3; Appeal and Error, 38; Deeds and Conveyances, 23.

RIGHTS. See Judgments, 15; Evidence, 36.

RIGHT OF WAY. See Schools, 3; Statute of Frauds, 1; Electricity, 1; Negligence, 22.

ROADS AND HIGHWAYS.

1. *Road Commissioners—Governmental Functions — Negligence.* — In the absence of an allegation that road commissioners, exercising governmental functions, have taken personal charge of the work, plaintiff, a convict, was assigned to do, or that they were dealing with same purely as administrative officials, or that they acted corruptly or with malice in their official capacity, when plaintiff was injured by the negligence of one of their employees, no cause of action is stated against them, and a demurrer to the complaint filed on this ground was properly sustained. *Hyder v. Henderson County*, 663.

RULES OF COURT. See Appeal and Error, 13, 21.

RULE IN SHELLEY'S CASE. See Wills, 2; Estates, 20.

SAFE DEPOSIT BOXES. See Bailment, 1.

SAFE PLACE TO WORK. See Employer and Employee, 1, 5, 8, 19, 24.

SALES. See Carriers, 1; Sheriffs, 1; Estates, 6; Statutes, 7, 8; Contracts, 24; Corporations, 3; Pleadings, 19.

SCHOOLS. See Pleadings, 14.

1. *Schools—Municipal Corporations—Liability of Official Boards and Individual Members—Mechanics' Liens—Liens.*—The failure of a school committee to require of the contractor a bond as provided for by C. S., 2445, is expressly made by the statute a misdemeanor on the part of the individual members, and no civil liability for such failure attaches either to the school district or to the individual trustees, but only by indictment against the individuals composing the board. *Noland Co. v. Trustees*, 250.

2. *Schools—Education—Electric Lighting—Demurrer.*—The proper lighting of a public school building is one of the needs for the efficiency of the proper use thereof, and where funds had been provided for the purpose, a contract made in the discretion of the county board of education to supply them, may be enforced. *Conrad v. Board of Education*, 390.

3. *Same—Rights of Way—Title—Statutes.*—Where in the exercise of a sound discretion the board of education of a county acting in pursuance of the statute, has contracted to supply with electric lights a public school building then existing, the contract will not be declared invalid because it does not appear, on demurrer, that the title to the rights of way of the pole and wire lines have not been acquired. C. S., 5472. *Ibid.*

4. *Same — Municipal Corporations — Education — General Power — Statutes.*—Under the general statutory authority of Art. 5, ch. 95, vol. III, of the Consolidated Statutes, the erection of electric transmission lines to supply public school buildings with electric lighting is given to the board of education of a county. C. S., 5467, 5478. (Vol. III.) *Ibid.*

SCHOOLS—*Continued.*

5. *Same—Statute of Frauds—Contracts.*—The construction and installing of an electric light system for a public school building does not come within the requirements of C. S., 5468, that a contract therefor must be in writing. *Ibid.*

6. *Same—Parties—Assignment of Contracts — Actions — Defense.* — The assignee for a consideration of a contract for the installation of wires, the building of an electric transmission line, etc., for lighting a public schoolhouse, is the proper party in interest to maintain an action thereon against the county board of education, without prejudice, however, to any defense against the contractor who has assigned the contract. *Ibid.*

SENTENCE. See Constitutional Law, 3.

SEPARATION. See Divorce, 1.

SERVICE. See Process, 1; Judgments, 13, 14; Actions, 18; Process, 2.

SET-OFF. See Equity, 7.

SETTLEMENT. See Contracts, 14; Taxation, 3, 4.

SEWAGE. See Pleadings, 8; Injunction, 1.

SHAREHOLDERS. See Corporations, 2.

SHERIFFS. See Officers, 1, 2; Statutes, 5; Taxation, 3, 4.

1. *Sheriffs—Attachment—Execution—Notification by True Owner—Sale Damages—Title.*—Where the sheriff has seized under levy of attachment personal property, and has been notified by a stranger to the action that he is the owner thereof and that should the sheriff sell the same it would be at his own peril, the party so notifying is not estopped to maintain his action for damages against the sheriff and the sureties on his bond, or in the proceedings, and to establish his title as a condition to his recovery. *Flowers v. Spears*, 747.

SIDEWALKS. See Municipal Corporations, 10.

SLANDER. See Arrest, 1.

SPECIFIC DEVISES. See Wills, 6.

SPIRITUOUS LIQUOR. See Intoxicating Liquor.

STARE DECISIS. See Appeal and Error, 34.

STATE HIGHWAY COMMISSION. See Counties, 1; Government, 6.

STATEMENT. See Appeal and Error, 5.

STATUTES. See Courts, 2, 3, 5; Counties, 1, 3; Divorce, 1; Evidence, 8, 11, 34; Health, 1; Judgments, 1, 9, 10, 14; Telegraphs, 1; Wills, 4, 5; Contracts, 1, 3, 23; Pleadings, 1, 3, 15, 16, 20; Appeal and Error, 7, 29; Constitutional Law, 3; Automobiles, 1; Crminal Law, 1, 2, 9; Bills and Notes, 2, 8; Comity, 1; Government, 1, 4, 7, 8; Injunction, 4; Mechanics' Lien, 1; Municipal Corporations, 1, 8, 15, 17; Waters, 1; Elections, 1; Process, 1, 2; Taxation, 1; Officers, 1; Negligence, 8, 12, 14; Schools, 3, 4; Actions, 5, 12, 16; Banks and Banking, 7; Estates, 6;

STATUTES—*Continued.*

Instructions, 4, 7, 9, 11, 15; Intoxicating Liquor, 3, 4, 5; Homestead, 1; Landlord and Tenant, 1; Guardian and Ward, 1; Removal of Causes, 1; Education, 1; Carriers, 4; Drainage District, 1; Deeds and Conveyances, 16, 18; Indictment, 2.

1. *Statutes—Interpretation—Captions—Title.*—The caption or title of a statute cannot by interpretation have the effect of extending the clear and unambiguous meaning thereof as expressed in the body of the act. *Corporation v. Motor Co.*, 157.

2. *Statutes—In Pari Materia—Interpretation—Landlord and Tenant.*—C. S., 2343, allowing the lessor the right of entry upon the leased premises upon failure of the lessee to pay the rent, etc., and C. S., 2372, are *in pari materia*, and should be construed together. *Ryan v. Reynolds*, 563.

3. *Statutes—Recoupements — Offset — Counterclaim — Actions — Common Law.*—Recoupement and set-off, and counterclaim which is of a broader scope, are creatures of statute unknown to the common law. *Comrs. of Moore v. Blue*, 638.

4. *Statutes—Interpretation—Retroactive Statutes — Taxation.*—A statute which changes the law heretofore existing in permitting the sheriff to plead a counterclaim as to the settlement of his taxes according to the certified tax books he has received from the county for the purpose, and expressing that it was to be in force from and after its ratification, cannot be construed to have a retroactive effect. *Ibid.*

5. *Same—Sheriffs—Settlement of Taxes.*—Chapter 254, Public Laws of 1925, expressly permitting a sheriff to plead a counterclaim in his settlement for taxes, covers specific errors and mistakes made against ex-sheriffs or tax collectors, and being expressly prospective in effect, is unavailable as a counterclaim for the settlement of taxes collected for preceding years by the same sheriff. *Ibid.*

6. *Statutes—Retroactive Statutes — Interpretation — Presumptions.*—For the courts to declare a statute retroactive in effect, the legislative intent as therein expressed must be clear and unmistakable, the presumption being to the contrary. *Ibid.*

7. *Statutes — Private Local Laws — Municipal Corporations — Cities and Towns—Private Sale of Lands—In Pari Materia.*—Where a city has broad powers to sell its real estate not held for governmental purposes and uses, and later its charter has been amended so as to curtail these powers and in conformity with this omission in the private act, a public act is passed requiring previous notice of sale by advertisement in a prescribed way and the sale be public, the private and public acts are to be construed *in pari materia*. *Asheville v. Herbert*, 732.

8. *Same—Advertisement of Private Sale.*—Where the charter of a city, requiring that its lands not held for present public use, has been amended so as to curtail the broad powers theretofore given in respect to sale and a general statute requires a certain preceding advertisement before the lands may be sold, the requirements of the public statute must be complied with in order for the city to make a valid sale. C. S., 2688. *Ibid.*

STATUTES—*Continued.*

9. *Same—Repugnancy.*—The repugnancy between a private statute authorizing a city to sell its lands and a later public statute on the subject generally, must be real and not seeming, in order to work a *pro tanto repeal*, and repeal by implication will be avoided if possible, and the two statutes will be construed together so as to give effect to both unless there is contradiction or repugnancy, or absurdity or unreasonableness, and mere difference in their terms is not always sufficient. *Ibid.*

10. *Same—Trusts.*—A statute authorizing a city to sell municipal lands does not by implication apply to such as are held in trust for its use or to streets in reference to which adjoining property owners have acquired rights, such as by dedication and resulting improvements. *Ibid.*

11. *Statutes—Actions—Wrongful Death—Damages—Statutes in Derogation of Common Law.*—The statute permitting a recovery by the personal representative for the estate of a decedent for his wrongful death, is in derogation of a common law and its provisions must be strictly construed in order to maintain the action. *McGuire v. Lumber Co.*, 806.

STATUTE OF FRAUDS. See Contracts, 6, 9, 34; Schools, 5.

1. *Statute of Frauds—Deeds and Conveyances—Right of Way—Easements—Incorporeal Hereditaments.*—The granting of a right of way by the owner upon his land is of an easement thereon, an incorporeal hereditament, and is required by the Statute of Frauds to be in writing. C. S., 988. *Brick Co. v. Hodgin*, 582.

2. *Same—Prescription—Way of Necessity.*—A way of necessity arises from a grant proved or presumed from prescription usually from mere necessity in using the land conveyed or retained by the grantor, in most cases construed to come within the terms of the grant. *Ibid.*

3. *Same—Parol Evidence.*—Where the owner conveys a part of his land without outlet except one designated to a certain public highway, the way so designed will control the vendee's selection, and parol evidence tending to show a different one is incompetent. *Ibid.*

STIPULATIONS. See Telegraphs, 2; Carriers, 3; Insurance, 2.

STOCK. See Corporations, 3.

STREETS. See Injunction, 4; Municipal Corporations, 1, 6, 10.

SUBROGATION. See Equity, 5.

"SUBSCRIBED." See Municipal Corporations, 16.

SUICIDE. See Insane Persons, 1.

SUITS. See Municipal Corporations, 4; Constitutional Law, 8; Equity, 9; Deeds and Conveyances, 22.

SUMMONS. See Comity, 2; Process, 1, 3; Judgments, 13.

SUPERIOR COURTS. See Judgments, 11; Appeal and Error, 28, 29; Courts, 5.

SUPREME COURT. See Evidence, 7; Appeal and Error, 28, 34; Pleadings, 17.

SURETIES. See Bills and Notes, 2.

SURFACE WATER. See Municipal Corporations, 10, 14.

SURPRISE. See Judgments, 9.

SURVIVORSHIP. See Husband and Wife, 1.

TAXATION. See Constitutional Law, 2; Government, 1; Municipal Corporations, 1, 4; Statutes, 4, 5.

1. *Taxation—Constitutional Law—Inheritance—Statutes.*—An inheritance tax is in the nature of an excise tax, or one on acquiring property or inheriting from a decedent, and does not come within the prohibition as to taxing an income upon property when the property itself is taxed, Const., Art. V, sec. 3, and its impositions rests with the legislative power. *In re Davis; In re Burwell*, 358.

2. *Same—Evidence—Tax Books.*—The value of lands at the time of the testator's death is the basis upon which the inheritance tax is laid, and its value as ascertained by the local tax assessor, does not control, nor are the local tax books evidence in court of its real value for the purposes. *Ibid.*

3. *Taxation — Counties — Sheriffs — Settlement — Counterclaim.* — It is against sound policy to permit a sheriff to plead a counterclaim or set off against his settlement with the county in accordance with tax books given into his hands and certified for the purpose of collection, such sums as he deems to have been erroneously placed thereon. *Comrs. of Moore v. Blue*, 638.

4. *Same—Contracts.*—Taxes are not debts existing by contract, but collectible by the counties under the exercise of their governmental functions and for their existence. *Ibid.*

5. *Taxation—Sheriffs—Tax Books—Settlement—Estoppel.*—A sheriff who has received the certified tax books for the collection of taxes, is estopped to deny the validity of the taxes as therein assessed, after he has assumed to act accordingly. *Ibid.*

6. *Taxation—Discretion of Court—Safe-Keeping of Tax Books — Appeal and Error.*—In an action by a county to recover from a sheriff a balance due upon the tax book certified and delivered to him, it is within the sound discretion of the trial judge to order the tax list deposited in a fire-proof vault of the county to be available to the inspection of the parties and the public, retaining the cause for further and appropriate orders as conditions may require. *Ibid.*

TELEGRAPHS.

1. *Telegraphs—Commerce—Cipher and Obscure Messages—Federal Control—Statutes.*—The regulation as to interstate telegraphic messages has been taken over by an act of Congress and made uniform in certain classifications by the Interstate Commerce Commission, including obscurely worded or written messages, or messages written in cipher, and the decisions of the Supreme Court of the United States as to the measure of liability of a telegraph company in interstate commerce are controlling in the State courts. *Hardie v. Tel. Co.*, 45.

TELEGRAPHS—*Continued.*

2. *Same—Contracts—Torts—Valid Stipulations.*—A telegraphic message written obscurely in cipher is not presumed to be understood by the telegraph company accepting it for transmission and delivery, and under the Federal decisions, upon a message of this character in interstate commerce, there can be no recovery of actual damages when the character or meaning of its contents are not disclosed to the telegraph company handling the same, whether the action be regarded as in contract or tort, as such damages will not be presumed upon the face of the message to have been in contemplation of the parties when the transaction was entered into by them. *Ibid.*

3. *Same—Parties—Sender of Message.*—Both the sender and sendee of a telegraphic message are bound by the valid stipulations on an interstate telegram, and the latter may not recover upon a mistake made in the transmission of an obscure or cipher message when the sender may not do so under the Federal decisions and statutes. *Ibid.*

4. *Telegraphs—Error in Transmission—Negligence—Prima Facie Case.*—Where a telegraph company receives a message for transmission and delivers it with its wording or meaning changed, a prima facie case of negligence is made out against it, and casts upon the defendant the *onus* of showing to the contrary. *Leigh v. Tel. Co.*, 700.

5. *Telegraphs—Negligence—Error in Transmission—Contracts—Futures—Ratifications.*—Where a telegraph company accepts for transmission and delivery a message to cotton brokers to buy cotton for future delivery upon condition that an expected government report shows a certain shortage in crop, and the message is delivered omitting the condition of purchase, and the commission man buys at a price that is productive of loss to the sender of the message who thereafter with knowledge of the error accepts the purchase and orders his brokers to sell upon the open market to his loss, the resultant loss is not proximately caused by the negligence in the transmission of the message, and the seller cannot recover it from the telegraph company. *Ibid.*

6. *Same—Principal and Agent.*—Where a telegraph company erroneously transmits and delivers to cotton exchange brokers a telegram to purchase cotton futures on the cotton exchange, the minds of the sender and the seller of the cotton do not come to an agreement necessary to a valid contract: *Semble*, a telegraph company is not the agent of the sender of a telegram so as to bind him to a contract that he has not made, through error in transmission. *Ibid.*

TENDER. See Landlord and Tenant, 1.

TERMS. See Process, 3.

TESTAMENTARY CAPACITY. See Wills, 11.

TIME. See Appeal and Error, 7.

TITLE. See Ejectment, 1; Trusts, 2; Automobiles, 1; Statutes, 1; Carriers, 2; Schools, 3; Contracts, 11, 24; Equity, 9; Estates, 7, 18; Deeds and Conveyances, 19; Limitation of Actions, 1; Sheriffs, 1.

TOOLS AND APPLIANCES. See Employer and Employee, 19, 24.

TORTS. See Telegraphs, 2; Pleadings, 7; Employer and Employee, 12; Actions, 4, 16; Government, 4.

TRANSCRIPT. See Liens, 1.

TRANSFER. See Automobiles, 1; Removal of Causes, 1, 2.

TRANSPORTATION. See Intoxicating Liquor, 4, 5.

TRESPASS. See Injunction, 1; Municipal Corporations, 13.

TRIALS. See Appeal and Error, 29, 32; Municipal Corporations, 12; Constitutional Law, 4; Officers, 1.

1. *Trials—Jury—Agreement—Discretion of Court—Appeal and Error.*—Where a defendant introduces evidence on the trial, his request for the opening and concluding speech to the jury is addressed to the discretion of the trial judge, and his refusal is not appealable. Rule 6, 185 N. C., 808. *Michaux v. Rubber Co.*, 617.

TRUSTS. See Wills, 1; Estates, 4; Deeds and Conveyances, 11, 14, 18; Principal and Agent, 3; Executors and Administrators, 2; Statutes, 10.

1. *Trusts—Limitation of Actions—Disavowal of the Trust—Notice.*—The law does not favor one who having assumed a trust and then seeks to discontinue it, and holds the subject thereof to his own benefit, and for the ten year statute of limitations to bar an action in his favor, the disavowal of the trust must have been by clear and unequivocal acts and words brought to the notice of the *cestui que trust*. The three year statute is inapplicable. *Hospital v. Nicholson*, 119.

2. *Trusts—Payment of Purchase Money—Title—Deeds and Conveyances.*—Where a purchaser of lands furnishes the money therefor and has the naked legal title conveyed to another, the presumption is, except in conveyances from a husband to his wife, the creation of a resulting trust for the benefit of the one furnishing the purchase price. *Tire Co. v. Hester*, 412.

3. *Same—Husband and Wife.*—With the proceeds of the sale from his wife's land the husband bought another tract of land, and took title in himself, and thereafter conveyed the legal title to his wife. The creditors of the husband brought suit to set aside this conveyance as fraudulent against them, and the evidence was conflicting as to whether or not the husband held the title in trust for his wife: *Held*, reversible error for the court to direct a verdict upon the evidence in favor of plaintiffs. *Ibid.*

4. *Trusts—Resulting Trusts.*—A resulting trust arises: 1, when the purchaser pays the purchase money, but takes title in the name of another; 2, where a trustee or other fiduciary buys property in his own name with trust funds; 3, where the trusts of a conveyance are not declared, or are partially declared or fail; 4, where a conveyance is made without any consideration, and it appears from circumstances that the grantee was not to take beneficially. *Ibid.*

5. *Same — Evidence — Quantum of Proof — Instructions — Questions for Jury.*—In order to establish a resulting trust, the proof must be clear, cogent, and convincing, which is for the jury to determine upon the evidence under proper instructions from the court. *Ibid.*

TRUSTS—*Continued.*

6. *Same—Partnership—Principal and Agent.*—In a suit by the creditors to set aside a deed to lands from the husband to his wife as fraudulent against them, it is competent when relevant for the husband to introduce and testify to a financial statement made by himself of a partnership of which he was a member at the time of the transaction complained of upon the question of whether he had retained property sufficient to pay his debts. *Ibid.*

TRUSTEES. See Wills, 3.

TURLINGTON ACT. See Intoxicating Liquor, 1.

UNIFORMITY. See Constitutional Law, 2.

UNDUE INFLUENCE. See Wills, 9, 10, 12.

USER. See Municipal Corporations, 6.

VALUE. See Judgments, 3.

VARIANCE. See Appeal and Error, 9; Pleadings, 11.

VENDOR AND PURCHASER. See Pleadings, 2; Contracts, 9.

1. *Vendor and Purchaser—Carriers of Goods—Delivery—Questions for Jury—Questions of Law.*—Where the goods contracted to be sold are not required by the contract or agreement to be delivered to the purchaser, a delivery by the seller to the railroad company when such is contemplated, is nothing else appearing a delivery to the consignee so far as the consignor's liability is concerned; and where there is no express agreement as to when delivery shall be made, the law presumes that it will be done in a reasonable time, which raises a mixed issue of law and fact for the jury, unless it appears by admissions or otherwise, that such delivery was either without delay or unduly delayed, when the question is one of law alone for the judge to determine. *Colt v. Kimball*, 169.

VENUE. See Government, 7.

VERDICT. See Principal and Agent, 1; Appeal and Error, 3, 8, 33; Constitutional Law, 4; Intoxicating Liquor, 7.

VESTED INTERESTS. See Estates, 19.

VESTED RIGHTS. See Counties, 3; Estates, 4, 7.

VICE PRINCIPAL. See Principal and Agent, 1.

VOTERS. See Counties, 1.

WAGERS. See Contracts, 1.

WAIVER. See Contracts, 30.

WARNING. See Employer and Employee, 2.

WARRANTY. See Deeds and Conveyances, 1, 3, 4, 5, 7; Pleadings, 2; Guardian and Ward, 1.

WATERS.

1. *Waters — Easements — Condemnation — Statutes — Ponding Water.* — Where the lower proprietor has dammed a stream on his own land, and has ponded the water back upon the lands of the upper proprietor under license of the common source of title to use the dam for a public mill, and the license has been later revoked and an easement has thereafter been obtained under judgment of the court in pursuance of C. S., 2555, the easement so acquired is only for the purpose of the use of the mill as stated, C. S., 2531, and does not extend to the exclusive use of water upon the lands of the upper proprietor for fishing and seining. *Thomas v. Morris*, 244.

2. *Same—Limitation of Actions.*—Where the lower proprietor has acquired an easement in the lands of the upper proprietor to pond water back thereon from a dam erected on his own land to operate a public mill, the exercise of this right under the easement does not affect the title to the submerged land of the upper proprietor or subject the upper proprietor to an action for damages that will start the running of the statute of limitations, nor will this use of the water ponded on the land of the upper proprietor by the lower proprietor for fishing with hook and seine ripen into his exclusive use for these purposes. *Ibid.*

WATERWORKS. See Government, 4.

WAY OF NECESSITY. See Statute of Frauds, 2.

WIDOWS. See Descent and Distribution, 1; Homestead, 2.

WILLS. See Estates, 4, 9, 10, 11, 14, 15, 17; Equity, 10.

1. *Wills—Devises—Trusts—Leases—Occupancy—Charges—Intent.*—A devise of hotel property to a trustee for the use and benefit of a daughter as long as she shall remain therein and pay certain expenses thereof, giving the trustee the right to terminate her interest in the event of her failure to do so: *Held*, the daughter had the right under the will to lease the premises and receive and enjoy the rental so long as she paid the expenses incident thereto as required by the will. *Lide v. Wells*, 37.

2. *Same—Powers—Estates—Rule in Shelley's Case.*—Where the will gives discretionary power to the trustees therein named to sell certain of the testator's lands within a certain period of time, it may only be exercised by them within the stated period, and otherwise subject to certain contingent limitations that the testator has created for his children, grandchildren, etc.; and the word "heirs" used in this will is held to be in the sense of children and not within the meaning of the rule in *Shelley's Case*. *Ibid.*

3. *Same—Executors—Trustees—Intent.*—Where in his will the testator gives a certain limited power to his executor to sell certain of the lands, and enlarged power to his trustees named therein, and has by codicil named his son as an additional trustee, the intent of the testator, as gathered from the will, does not affect the restricted power of sale given to the executor. *Ibid.*

4. *Same—Statutes—Contingent Interests.*—Where the testator gives the discretionary power of sale to his trustees of certain of his lands,

WILLS—*Continued.*

reserving therefrom a designated vacant lot, the lot so expected cannot be sold by virtue of the provisions of C. S., 1744, but the court in the exercise of its equitable jurisdiction, may order a sale, and the purchaser, upon complying with his bid, will get a good title. *Ibid.*

5. *Wills—Statutes—Descent and Distribution—Dower—Heirs—"Issues."*—Where the father's will leaves his estate consisting of lands to his wife and to a child *in ventre sa mere* at the time the will was written, and the child thus provided for has been born in the lifetime of the father, but has predeceased him; and another child is born of the marriage and the mother and the child survive the father: *Held*, under the rule of descent, C. S., 4169, the son unprovided for by the will living at the time of his father's death, will inherit the real estate of which his father dies seized, subject to the dower of the widow, his mother. *Nicholson v. Nicholson*, 122.

6. *Wills—Residuary Clause—Lands—Specific Devises.*—After making disposition by will of certain of the property by item six, the testator provides "whatever may remain of my estate both real and personal" to be divided and distributed, with particular direction as to named devisees, with further direction that if the devisees or any of them should caveat the will, they should receive ten dollars each: *Held*, under the presumption against intestacy and construing the will to effectuate the testator's intent, a tract of land not specifically mentioned in the will came within the meaning of the residuary clause and not excluded because a lot of land had been described therein, as particularly subject to its provisions. *Gordon v. Ehringhaus*, 147.

7. *Wills—Interpretation—Intent—Presumption.*—In construing a will the presumption is against partial intestacy and the rules of construction are only for the purpose of aiding the courts in finding and effectuating the testator's intent, unless it contravenes the law or public policy. *McCullen v. Daughtry*, 215.

8. *Same—Bequests—"Money on Hand."*—In interpreting the residuary clause of a will, money on hand will not be construed in its restricted sense when it appears that the testator otherwise intended by a proper construction of his will, and in this case it is *held* that a devise to his wife and son of his moneys on hand not only included such as he had in the bank at the time of his death, but commissions on the sale of the balance of a carload of fruit sold by his administrator *c. t. a.* after the testator's death. *Ibid.*

9. *Wills—Caveat—Issues—Undue Influence—Instructions—Evidence—Appeal and Error—Presumptions.*—Upon a single issue of *devisavit vel non* on a trial to caveat a will, whereupon both the mental capacity of and undue influence upon the testator were in question with verdict in favor of the caveators, it will not be assumed that the trial judge, on the propounder's appeal, correctly instructed the jury, when the evidence on the question of undue influence is not sufficient to sustain the verdict on the single issue. *In re Hurdle*, 221.

10. *Wills—Caveat—Undue Influence—Evidence—Instruction—Appeal and Error.*—Where the testator has devised her estate to the church, and the only evidence upon the question of undue influence involved in the

WILLS—*Continued.*

action is the frequent visits of her pastor, that she was a generous and devoted member of the church, and had no love or affection for her heirs at law, the caveators in the present action, it is legally insufficient to show that her mind in making the will had been supplanted by the controlling will of another under the rule of law applicable, or support an affirmative answer to the issue. *Ibid.*

11. *Wills—Testamentary Capacity—Mental Capacity—Instructions—Appeal and Error.*—To make a will valid it is required that the testatrix should have a sufficient mind to comprehend intelligently the nature and extent of her property, those whom she wishes to benefit, without controlling effect given to her literacy or illiteracy or to the quality of her intellect, and while it is at least questionable for the judge to charge the jury that they must have a "clear" understanding in this respect, it will not be held for reversible error if the charge taken as a whole is not prejudicial to the appellant. *In re Creecy*, 301.

12. *Same—Undue Influence—Evidence—Relationship.*—Upon the question of the mental capacity of undue influence upon the testatrix in making a will, evidence is competent to show that the ones who were in relationship with her were to be considered worthy of her consideration, and their condition, and whether they were in need of her benefits at the time. *Ibid.*

WITNESSES. See Evidence, 20, 35; Criminal Law, 8, 9.

WORDS AND PHRASES. See Estates, 7.

WRITTEN INSTRUMENTS. See Contracts, 6, 34, 36, 37, 40.

WRONGFUL DEATH. See Process, 2; Statutes, 11.

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